Supreme Court, U.S.
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No. 02-___

IN THE

Supreme Court of the United States

NIKE, INC., *et al.*,

Petitioners,

v.

MARC KASKY.

On Petition for a Writ of Certiorari
to the Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a corporation participates in a public debate – writing letters to newspaper editors and to educators and publishing communications addressed to the general public on issues of great political, social, and economic importance – may it be subjected to liability for factual inaccuracies on the theory that its statements are "commercial speech" because they might affect consumers' opinions about the business as a good corporate citizen and thereby affect their purchasing decisions?

2. Even assuming the California Supreme Court properly characterized such statements as "commercial speech," does the First Amendment, as applied to the states through the Fourteenth Amendment, permit subjecting speakers to the legal regime approved by that court in the decision below?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the following parties appeared below and are petitioners here: Philip Knight; Thomas Clarke; Mark Parker; and David Taylor.

RULE 29.6 STATEMENT

Petitioner Nike, Inc. has no parent corporation and no publicly held company owns 10% or more of the corporation's stock.

RULE 29.4(C) CERTIFICATION

Petitioner certifies that 28 U.S.C. 2403(b) may apply and that this Petition has been served upon the Attorney General of California.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Nike, Inc., *et al.*, respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of California in this case.

OPINIONS BELOW

The opinion of the Supreme Court of California (Pet. App. 1a-64a) is published at 45 P.3d 243. The opinion of the Court of Appeal of California (Pet. App. 66a-79a) is published at 93 Cal. Rptr. 2d 854. The orders of the Superior Court granting petitioners' demurrer and dismissing the complaint (Pet. App. 80a-81a) are unpublished.

JURISDICTION

The Supreme Court of California denied rehearing (Pet. App. 82a) on July 31, 2002. This Court has jurisdiction under 28 U.S.C. 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the U.S. Constitution, made applicable to the states by the Fourteenth Amendment, provides in relevant part: "Congress shall make no law * * * abridging the freedom of speech, or of the press." The relevant provisions of California law are reproduced in the appendix (at 83a-88a).

STATEMENT OF THE CASE

Respondent brought this suit against petitioners asserting violations of California unfair trade practice and false advertising law. At every stage of the proceedings, Nike argued that the complaint must be dismissed under the First Amendment. See S. Ct. R. 14.1(g)(i); Pet. Demurrer 7-12; Pet. Cal. C.A. Br. 17-31; Pet'r Cal. S. Ct. Br. 7-47. The superior court and court of appeal agreed. But the California Supreme Court reversed in a four-to-three decision, holding that petitioners' speech is actionable under state law and receives *no* protection under the First

Amendment to the extent it is false or misleading. A strong dissent urged this Court to grant certiorari.

1. Petitioner Nike is the world's leading athletic apparel and equipment manufacturer. It has also been made the principal focus of the passionate world-wide debate over "globalization" – *viz.* the conditions under which multinational companies invest in developing economies. Nike's goods are produced by subcontractors with some 500,000 employees at roughly 736 facilities in fifty-one countries. Beginning in 1995, Nike was the target of allegations that, at its facilities in Southeast Asia, conditions were dangerous, workers were mistreated and underpaid, and child labor was being utilized. Those assertions quickly generated enormous media scrutiny and editorial commentary, much of it pointed and vituperative.

The upshot of these charges was not that Nike's products were themselves inferior, overpriced, or harmful, but rather that it was an immoral company, generating great profits on the backs of Third-World labor. These allegations were part and parcel of a larger debate over the degree to which multinational investment should be regulated and the pace at which it should occur. And in almost every instance, the allegations against Nike were held out as supposedly typifying corporate failure to adhere to ethical standards of conduct. Around this country, and around the world, there were calls for boycotts, demands for legislative action, and a broad effort to bring the heavy weight of moral opprobrium down on the shoulders of Nike and its employees.

Nike soon found itself responding on a daily, and even hourly, basis to claims that it was operating sweatshops in supposedly slave-labor conditions.[1] Its representatives were regularly deluged by press inquiries for comments on news reports

[1] A number of examples are included in the more than 250 pages of exhibits to respondent's Complaint, which petitioner is lodging with this Court. See Pet. Lodging (First Amended Complaint of Milberg, Weiss, Bershad, Hynes & Lerach LLP for Marc Kasky versus Nike, Inc., *et al.* (July 2, 1998)) (hereinafter "Compl.").

scheduled to be published immediately. Although some independent news organizations concluded that some allegations against Nike had merit, former United Nations Ambassador Andrew Young concluded in an independent review commissioned by Nike that the charges were largely false. Nike then purchased "editorial advertisements" – *i.e.*, paid political advertisements (see *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 266 (1964) (affording such expression the full protection of the First Amendment)) – to report that finding. Nike officials also responded to the charges through press releases, letters to the editor and op-eds in newspapers around the country, and letters to officers of major national universities.

These various statements conveyed the view that Nike *does* act morally because its investments produce substantial economic and political benefits for its workers and because employees of its contract facilities are paid fairly and treated well. Although some of Nike's statements recognized that ethical issues are relevant to consumers' purchasing decisions, none appeared in advertising of its products or urged consumers to buy those products.

2. Respondent Marc Kasky, identifying himself only as a California resident, brought this suit against Nike and a number of its employees who had spoken about globalization on the company's behalf, alleging that their statements were "false" or amounted to "misrepresentations." *E.g.*, Compl. ¶ 75. Respondent pointedly "alleges no harm or damages whatsoever regarding himself individually" – such as that he had read a single one of the statements at issue, much less that he had been induced to purchase any Nike product or injured in any way as a result. *Id.* ¶ 8. Respondent also disclaims any "personal knowledge" of the facts underlying his own case (other than that he lives in California, which is his sole qualification to bring the suit). *Id.* ¶ 3. Respondent has thus appointed himself as a "private attorney general" acting "on behalf of the General Public of the State of California." *Id.* ¶ 8.

The allegations of the complaint fit a consistent pattern. Respondent invokes some third party's statement about supposedly poor conditions at a particular Nike contract facility, notes

Nike's denial, and flatly asserts that the former is true and the latter false, notwithstanding that the complaint disclaims any personal knowledge of the actual facts. Some of the charges are contained in press reports, while others are made by advocacy groups. Thus the complaint repeatedly invokes (and reproduces as Exhibit E) a "report provided by Thuyen Nguyen, of Vietnam Labor Watch," stating that this individual "spoke to 35 workers individually and at length" who reported poor and dangerous working conditions and low pay. See also, *e.g.*, Compl. ¶ 48 & Exh. AA (repeating claims contained in "a newspaper entitled *Thanh Nien* and translated by Vietnam Labor Watch"). The complaint dismisses Nike's responses to these allegations as "false" and as amounting to "misrepresentations." *E.g.*, *id.* ¶ 75.

On this basis, the complaint asserts causes of action under California unfair trade practice and false advertising law. The former creates a private right of action to remedy "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by" California's false advertising law. Cal. Bus. & Prof. Code 17200, 17203. The latter makes a criminal misdemeanor, and creates a private right of action to remedy, any statement "which is untrue or misleading" and is made or disseminated "before the public in this state * * * in any newspaper or other publication * * * or in any other manner or means whatever." *Id.* §§ 17500, 17535. Although respondent Kasky at some points alleges that petitioners spoke negligently (*e.g.*, Compl. ¶ 77), the statutes he invokes impose "strict liability": even non-negligent misstatements are actionable, and even *truth* is not a defense where the truthful statements are deemed misleading. *Cortez* v. *Purolator Air Filtration Prods. Co.*, 999 P.2d 706, 717 (Cal. 2000) (unfair trade practices); *Chern* v. *Bank of Am.*, 544 P.2d 1310, 1316 (Cal. 1976) (false advertising).

The complaint does not contend that listeners considered petitioners' statements only for the purpose of making purchasing decisions: Kasky's theory is that Nike's statements, "although addressed to the public generally, were *also* intended to reach and influence actual and potential purchasers of Nike's products." Pet. App. 21a (emphasis added). Although respondent

claims no personal injury and therefore seeks no damages for himself, he seeks legal fees, the costs of the suit, and orders requiring Nike to disgorge all monies it earned in California as a result of its allegedly unlawful conduct, as well as "a Court-approved public information campaign to correct" its alleged misstatements, and to enjoin future misrepresentations regarding "working conditions under which NIKE products are made including, but not limited to, wages, hours, overtime, environmental, health and/or safety conditions, and the use of child labor." Compl. at 34.

3. Respondent Kasky freely concedes that, if the statements by petitioners underlying his complaint are anything other than "commercial speech," then the case must be "resolved in Nike's favor, and the statements are immune from state regulation." Resp. Cal. S. Ct. Br. 1. He thus does not contend that the application of the causes of action he asserts to these facts could survive rigorous First Amendment scrutiny. Nor does he contend that petitioners ever spoke with "actual malice" (*i.e.*, with reckless disregard for the truth) or that he could make out a claim for fraud, deceit, or libel. Petitioners accordingly moved to dismiss the suit as barred by the First Amendment.

a. The superior court agreed (see Pet. App. 81a (order)) and, on respondent's appeal, the California Court of Appeal unanimously affirmed (see *id.* 66a-79a). The court of appeal explained that petitioners' speech is not "commercial" because it "cross[es] the boundary between political and private decision-making": "citizens may want to translate personal discontent over Nike's labor practices into political action or may merely wish to refrain from purchasing its products." *Id.* 78a. Further, "[t]he fact that Nike has an economic motivation in defending its corporate image from such criticism does not alter the significance of the speech to the '*listeners*' – the consumers or other members of the public concerned with labor practices attending the process of economic globalization." *Id.* 78a-79a (citing *Linmark Assocs.* v. *Willingboro*, 431 U.S. 85, 92 (1977)) (emphasis added).

b. The California Supreme Court granted review – accepting respondent Kasky's assertions that the case presented par-

ticularly "important constitutional issues" (Resp. Pet. for Rev. 1) and a pure question of law (*id.* 16) – and reversed. Assuming the truth of respondent's allegations for purposes of its decision, the four-Justice majority first set out the conspicuously "broad" terms of California unfair trade practice and false advertising law, which it concluded encompass Nike's statements, notwithstanding that those statements were not made in product advertisements and included no product references. See generally Pet. App. 5a-7a. The majority then framed the dispositive constitutional issue as whether those statements constitute "commercial speech," reasoning that this Court has held that the First Amendment provides no protection to, and leaves the states free to ban, "commercial speech that is false or actually or inherently misleading." *Id.* 13a.

The majority adopted a three-part test applicable to the context of unfair trade practice and false advertising claims: "Commercial speech" is defined by the California court as statements (i) made by persons "engaged in commerce," (ii) to an audience that includes "actual and potential purchasers," (iii) in the form of "representations of fact of a commercial nature" such as "factual representations about its own business operations." Pet. App. 21a-22a. The majority opined that each of these elements is "implicit in" U.S. Supreme Court precedent, which concededly had never articulated such a test. *Id.* 18a. The majority also reasoned that this case was not controlled by this Court's landmark holdings in *Thomas* v. *Collins*, 323 U.S. 516 (1945), and *Thornhill* v. *Alabama*, 310 U.S. 88 (1940), that statements in the course of a labor dispute are entitled to full First Amendment protection because this case involves only the regulation of "false or misleading speech" and because those decisions in any event have been *sub silentio* superceded by "the modern commercial speech doctrine." Pet. App. 24a.

The majority further made clear that, on its view, commercial speech includes not merely statements made directly to the public, but also statements made to "persons (such as reporters or reviewers) likely to repeat the message or to otherwise influence actual buyers or customers." Pet. App. 44a. And it makes no difference that, in speaking, the business had "a secondary

purpose to influence lenders, investors or lawmakers" (*id.* 28a), for "[s]peech is commercial in its content [so long as] it is *likely* to *influence* consumers in their commercial decisions" (*id.*) (emphases added).

The majority held that Kasky's allegations described commercial speech under this standard, making petitioners' statements actionable if false or misleading. "Because in the statements at issue here Nike was acting as a commercial speaker, because its intended audience was primarily the buyers of its products and because the statements consisted of factual representations about its own business operations, we conclude that the statements were commercial speech for purposes of applying state laws designed to prevent false advertising and other forms of commercial deception." Pet. App. 23a. As supposedly false or misleading commercial speech, moreover, Nike's speech "receives *no* protection under the First Amendment, and therefore a law that prohibits only such unprotected speech *cannot violate constitutional free speech provisions*." *Id.* 27a (emphases added). The court accordingly remanded for a determination "whether any false representations were made." *Id.* 2a.

c. Three Justices dissented in two lengthy and vigorous opinions. Emphasizing the ongoing public debate over globalization, Justices Chin and Baxter reasoned that, "irrespective of Nike's economic motivation, the public has a right to receive information on matters of public concern." Pet. App. 32a (title). See also *id.* 33a ("The public at large, in addition to Nike's actual and intended customers, has the right to receive information from both sides of this international debate."). On the majority's contrary holding, "Nike's critics have taken full advantage of their right to 'uninhibited, robust, and wide-open' debate, [but] the same cannot be said of Nike, the object of their ire," solely because "Nike competes not only in the marketplace of ideas, but also in the marketplace of manufactured goods." *Id.* 31a (quoting *Garrison* v. *Louisiana*, 379 U.S. 64, 75 (1964)). "Handicapping one side in this important worldwide debate," those dissenters explained, "is both ill considered and unconstitutional" under this Court's precedents. *Id.* 31a. See generally *id.* 33a-39a (discussing cases).

Justice Brown dissented separately, urging this Court to grant certiorari either to reject the California Supreme Court's departure from precedent or to begin the process of reformulating the commercial speech doctrine. The majority's approach, she explained, "flouts the very essence" of this Court's commercial speech precedents by essentially deeming the existence of a corporate speaker dispositive, "stifling the ability of speakers engaged in commerce, such as corporations, to participate in debates over public issues." Pet. App. 45a. And the majority's bizarre contention that Nike's statements are "commercial speech" under its definition if they are false or misleading "betrays a fundamental misunderstanding of the issue presented" and "makes no sense": "Indeed, the majority begs the question by making false or misleading corporate speech commercial speech because it is false or misleading." *Id.* 60a.

Alternatively, Justice Brown urged this Court to revise its assumption "that all commercial speech is the *same* under the First Amendment" (Pet. App. 41a) (emphasis in original)), a view that fails to account for the increasing "intersection between commercial speech and various forms of noncommercial speech, including scientific, political and religious speech, [which] abound." *Id.* 42a. "As this gray area expands, continued adherence to the dichotomous, all-or-nothing approach developed by the United States Supreme Court will eventually lead us down one of two unappealing paths: either the forces of businesses in the public debate will be effectively silenced, or businesses will be able to dupe consumers with impunity." *Id.* 61a. Concluding that "the commercial speech doctrine needs and deserves reconsideration and [that] this is as good a place as any to begin," she "urge[d] the high court to do so here." *Id.* 64a.

4. The California Supreme Court denied rehearing (Pet. App. 82a), and this petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

The Petition for a Writ of Certiorari should be granted for three reasons. First, the California Supreme Court's decision flatly conflicts with this Court's precedents defining the limited

class of "commercial speech" that receives less than the full protections of the First Amendment. Second, the scheme of liability approved by the majority below cannot be reconciled with this Court's decisions prohibiting viewpoint discrimination by government – here, discrimination in favor of speech critical of commercial activity and against statements made by businesses in response – as well as its precedents holding that even commercial speech is fully protected when "inextricably intertwined" with noncommercial speech. Finally, it is essential that certiorari be granted now because nothing that can occur on remand will either illuminate the constitutional questions presented or alleviate the seriously adverse effects that the California Supreme Court ruling has on core free speech and on the public's access, through newsgathering by the media and otherwise, to speech vital to informed decisionmaking.

I. Certiorari Is Warranted To Review The California Supreme Court's Holding That Statements On Matters Of Public Interest That Could Influence Consumers' Purchasing Decisions Constitute "Commercial Speech."

The California Supreme Court's holding that businesses may be held strictly liable for misstatements they may make regarding issues of social importance conflicts with this Court's precedents. These conflicts are not minor errors of nuance or emphasis in the application of a jurisprudence that, perhaps of necessity, lacks the sharpest of definitional boundaries. This is not a close case. Whatever the exact margins of the category of "commercial speech" subject to lesser First Amendment protection, the statements at issue here fall well outside them.

The majority below reasoned that the public relies on corporations' statements about their operations to make not only ethical and political choices, but also *economic* decisions. This Court has already rejected attempts to extend the definition of "commercial speech" so far. It is settled that the full protections of the First Amendment apply except in the limited circumstance that speech – generally in the form of advertising – is intrinsically tied to a commercial transaction within the government's traditional power to regulate. Discussion of "public issues," by contrast, "occupies the 'highest rung of the hierarchy of First

Amendment values,' and is entitled to special protection." *Connick* v. *Myers*, 461 U.S. 138, 145 (1983). Certiorari should be granted to resolve the conflict.

A. The Decision Below Conflicts With This Court's Precedents Defining Commercial Speech.

1. The California Supreme Court held in this case that businesses' statements on issues of great public importance are "commercial speech" whenever they may influence consumers' buying decisions. The lower court thus adopted a theory of "ethical purchase behaviour" – *viz.* that in some instances purchasing by consumers turns not on the listener's views of the price or quality of the product but on a "*moral* judgment" about the corporate speaker. N. Craig Smith, MORALITY AND THE MARKET: CONSUMER PRESSURE FOR CORPORATE ACCOUNTABILITY 177 (1990) (emphasis added). The court accordingly held it immaterial whether the speech at issue appears on a product label, in a Nike catalog, on a billboard advertising shoes, or instead in a *New York Times* op-ed on one of the burning social issues of the day, because any of those is ultimately capable of affecting consumers' conclusions about the corporate speaker and thus shaping consumers' actions in the marketplace.

That theory goes beyond just uncomfortably constricting the breathing room for speech – it literally takes one's breath away. Petitioners' speech addresses the hotly debated issue of globalization, and many of their statements appeared in classic fora for protected speech – newspaper editorials and articles. Petitioners spoke not about the price and quality of products but about whether Nike is an ethical company. They responded to allegations that Nike's investment in the developing economies of Southeast Asia had produced dangerous and unconscionable working conditions. These accusations carried with them explicit and implied calls for boycotts of Nike products. Some newspaper editorials asked, "who wants to enjoy products made on the backs of human misery?" (Compl. Exh. J), while other accusers employed "such caustic and scathing words as 'slavery' and 'sweatshop'" (Pet. App. 30a (Chin, J., dissenting)).

In response, petitioners argued that Nike's investments are "helping to build economies, provide skills, and create a brighter future for millions of workers around the world." Compl. Exh. R. On Nike's view, "History shows that the best way out of poverty for [developing] countries is through exports of light manufactured goods that provide the base for more skilled production." *Id.* Exh. DD (letter from petitioner Philip Knight to *The New York Times*). Nike also expressed its understanding that the facts alleged against it were false: that, for example, it paid a living wage and that its subcontractors provided other benefits as well. *Id.* Exh. Z; see also *id.* Exh. P.

2. This Court has articulated three tests for identifying "commercial speech." See generally *Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 422-23 (1993). Petitioners' statements cannot be characterized as commercial speech under any of these formulations, and not even the majority below seriously contended to the contrary:

- In its recent decisions, the Court has "usually defined [commercial speech] as speech that does no more than propose a commercial transaction." *United States* v. *United Foods*, 533 U.S. 405, 409 (2001). See also, *e.g.*, *Lorillard Tobacco Co.* v. *Reilly*, 121 S. Ct. 2404, 2421 (2001); *Edenfield* v. *Fane*, 507 U.S. 761, 767 (1993). Petitioners' statements obviously did not "propose a commercial transaction" in any respect. Their editorials, comments to reporters, and even direct communications to consumers neither discussed particular products nor addressed the price or quality of the Nike line of goods. Particularly given that this Court has described the inquiry whether speech invited a commercial transaction as "*the test* for identifying commercial speech" (*Bd. of Trustees* v. *Fox*, 492 U.S. 469, 473-74 (1989) (emphasis added)), the conflict between the decision below and this Court's precedents is plain.

- In *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 66-67 (1983), which involved advertisements that were combined with discussion of social issues, this Court concluded that statements could properly be characterized as commercial speech on the basis of three factors in "combination": (1) advertising format; (2) reference to a specific product; and (3) the

speaker's economic motivation. Petitioners' speech lacks either of the first two of these characteristics: they were in public statements such as editorials, not advertisements; and they made no mention of a product. The California Supreme Court's holding that the third factor – that the speaker acts with an economic motivation – is nonetheless sufficient (see Pet. App. 15a), cannot be reconciled with *Bolger*'s conclusion that "economic motivation * * * would *clearly be insufficient* by itself to turn the materials into commercial speech." 463 U.S. at 66 (emphasis added). That has to be correct, for "[s]ome of our most valued forms of fully protected speech are uttered for a profit." *Fox*, 492 U.S. at 482. *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978), in particular, settled that speech by businesses on matters of public concern is not "commercial speech," notwithstanding the business's pecuniary interest in the issue. See also, *e.g.*, *United States* v. *Nat'l Treasury Employees Union*, 513 U.S. 454 (1995) (ban on receiving honoraria for speeches and writing on matters of public concern violates First Amendment as applied to rank-and-file executive branch employees).

• Finally, *Central Hudson Gas & Electric Co.* v. *Public Service Commission*, 447 U.S. 557, 561 (1980), held that commercial speech is "expression related solely to the economic interests of the speaker and its audience." Petitioners, however, were concerned not only with the individual purchasing decisions of their audience but also with the prospect of legislation restricting multinational investment and production. But the California Supreme Court held it was immaterial that Nike sought to "influence" not just potential customers but also "lenders, investors, or *lawmakers*." Pet. App. 28a (emphasis added).

For their part, petitioners' listeners incorporated the statements not into their economic conclusions about the value of Nike's products but rather into their moral conclusions about Nike as a company. See *supra* at 9-10. As the court of appeal recognized, those conclusions could just as easily be "translate[d] * * * into political action" as into purchasing decisions. Pet. App. 78a. The California Supreme Court nonetheless found it sufficient that petitioners' statements, "although addressed to

the public *generally*, were *also* intended to reach and influence actual and potential purchasers of Nike's products." *Id.* 21a (emphases added).

3. Nor could the California Supreme Court justify its remarkable departure from this Court's precedents on the ground that its decision at least adhered to the *rationale* underlying the "commercial speech" doctrine. "Commercial speech" under this Court's precedents is "'linked inextricably' with the commercial arrangement that it proposes" (*Edenfield* v. *Fane*, 507 U.S. 761, 767 (1993)), such that governmental regulation is an adjunct to the state's interest in "regulating the underlying transaction" (*id.*) and thus in "preventing commercial harms" (*Cincinnati* v. *Discovery Network*, 507 U.S. 410, 426 (1993)). Cf. *United Foods*, 533 U.S. at 412 (program of compelled speech may be constitutional as "the logical concomitant of a valid scheme of economic regulation"). In this case, by contrast, no one contends that petitioners' statements misled consumers regarding the characteristics of Nike products. Indeed, California law as authoritatively construed in this case does not require any nexus at all between the corporate operations described in the supposedly false or misleading speech and the transactions that occur in that state. This case principally involves statements regarding Nike's production in such countries as Vietnam, but it makes no difference for purposes of Kasky's complaint whether the Nike products made in Vietnamese factories are ever sold in the United States, much less in California. All that matters is that petitioners' statements supposedly make Nike look like a more ethical company to California consumers than it "truly is" – obviously, not a "*commercial*" harm.[2]

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[2] The requirement of a "commercial harm" is an application of the broader principle that speech may not be punished for "falsehood in the air" – *i.e.*, in the absence of an actual injury. Not only does the First Amendment preclude claims for defamation and for depiction in a "false light" on matters of public importance absent actual damage (*Time, Inc.* v. *Hill*, 385 U.S. 374, 387 (1967)), but even on matters of purely *private* concern, such a suit is permitted only if the speech is "wholly false *and clearly damaging*" (*Dun & Bradstreet* v. *Greenmoss*

California is also regulating speech on matters of public importance. By contrast, the "commercial speech" identified as such under this Court's precedents has a lesser role in the system of free expression because, in contrast to "ideological expression," it supposedly makes little or no "direct contribution to the interchange of ideas." *Va. State Bd.* v. *Va. Citizens Consumer Coun.*, 425 U.S. 748, 780 (1976). The decision below nonetheless turns entirely on the view that the public will listen to and value corporate speech, reaching moral judgments as a result, particularly in such contexts as the public debate over social issues like globalization. That is hardly the stuff of "low-value speech." Rather, it typifies the discussion of "public issues" that "occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick* v. *Myers*, 461 U.S. 138, 145 (1983).[3]

For these reasons, the California Supreme Court was in error when it suggested (Pet. App. 23a) that its decision is tantamount to forbidding the mislabeling of a product as manufactured by the "blind" or by "American Indian" workers, or forbidding false designations of origin. When the government requires that truthful information be included on product labels, which consumers generally consider at the point of sale, it is regulating the terms of the underlying commercial transaction, and it is preventing the peculiarly "commercial harm" of a consumer being

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Bldrs., 472 U.S. 749, 762 (1984) (plurality) (emphasis added)). See, *e.g.*, *Masson* v. *New Yorker*, 501 U.S. 496, 516-17 (1991) (First Amendment permits libel actions recognized at common law "to redress injury").

[3] This Court's commercial speech precedents also take the view that governmental regulation of statements regarding price and the other inherent qualities of a product is unlikely to deter valuable speech. The speaker's profit motivation and its ready ability to verify the truth of its statements on such matters act as an "anti-freeze" to the chilling effect of regulation. The prospect that valuable speech will be chilled under the decision below, by contrast, is all too real, because the lower court's holding extends beyond economic information that is essential to sales and that is easily verified to include the discussion of broad social issues. See generally *infra* at 26-27.

induced to purchase a product on the basis of a false description of its character. Further, as to both the speaker and the listener, the communication that is arguably actionable includes only a statement of fact divorced from any broader context or controversy and relates only to whether to consummate an already contemplated transaction, for the prospective purchaser's reading of the label provides neither the occasion for, nor any realistic prospect of, moral, ethical, or political debate. See generally *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 496 (1995) (Stevens, J., concurring). That is quite different from government efforts to regulate the content of communications offered – by just one side – in the course of a live and pressing public debate on a matter of international significance.[4]

B. The Decision Below Conflicts With *Thornhill* v. *Alabama* and *Thomas* v. *Collins*.

The California Supreme Court's decision conflicts not only with this Court's decisions defining commercial speech (see *supra*), but also with two seminal precedents holding that speech indistinguishable from petitioners' receives the full protections of the First Amendment. Not even the majority below seriously contended that its decision could be reconciled with *Thornhill* v. *Alabama*, 310 U.S. 88 (1940), and *Thomas* v. *Collins*, 323 U.S. 516 (1945). That conflict alone warrants certiorari. Even engaging in the insupportable assumption (see *infra* at 17-18) that *Thomas* and *Thornhill* have become moribund as the majority below thought (see Pet. App. 24a-25a), certiorari should be granted because it is "this Court's prerogative alone to overrule

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[4] In any event, this Court has never passed on the degree of First Amendment scrutiny applicable to the labeling provisions cited by the majority below, violations of which would readily be shown to satisfy the "actual malice" standard applicable to protected speech except in the rarest instance that a manufacturer made the truly "innocent mistake" of mislabeling its products' geographic origin or the special class of persons it employs. Cf. *Time, Inc.* v. *Hill*, 385 U.S. 374, 389 (1967) ("[T]he constitutional guarantees can tolerate sanctions against *calculated* falsehood without significant impairment of their essential function." (emphasis added)).

one of its precedents" (*State Oil Co.* v. *Kahn*, 522 U.S. 3, 20 (1997); see also *Rodriguez de Quijas* v. *Shearson/American Express*, 490 U.S. 477, 484 (1989)).

Thornhill holds that a ban on labor picketing violates the First Amendment. There, as here, the purpose of the speech "was concededly to advise customers and prospective customers" regarding labor conditions "and thereby to induce such customers" to change their purchasing decisions. 310 U.S. at 99. In contrast to the California Supreme Court's reasoning that petitioners' speech receives reduced constitutional protection because it sometimes influences purchasing decisions, this Court in *Thornhill* recognized that speech on matters such as "satisfactory hours and wages and working conditions in industry" is not limited to "mere local or private concern" but is instead "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." *Id.* at 103. Furthermore, "*[e]very* expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests." *Id.* at 104 (emphasis added).

Thornhill also rejects the California Supreme Court's view that the state may regulate petitioners' speech as an adjunct to its regulation of consumer transactions. This Court explained that, although the government has the unquestioned authority "to set the limits of permissible contest open to industrial combatants," "[i]t does not follow that the State * * * may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern." *Id.* Presaging this very case, the Court explained that "[a] contrary conclusion could be used to support abridgement of freedom of speech and of the press concerning almost every matter of importance to society." *Id.* That is particularly true where, as here, government seeks to regulate "nearly every practicable, effective means whereby those interested * * * may enlighten the public." *Id.*

The decision below equally conflicts with the follow-on holding of *Thomas* v. *Collins* that the First Amendment forbids a flat ban on the solicitation of union membership – or a law subjecting such solicitation to a licensing scheme – and that the First Amendment provides employers and employees "the same protection." Whereas the California Supreme Court opined that it would be possible for Nike – in interviews, letters, press releases, and the like – to discuss globalization and the accusations against the company without mentioning *facts*, this Court made clear in *Thomas* that no speaker can be expected to split its remarks apart in that fashion. Rejecting the state's argument that the statute merely required a license for *solicitation*, the Court explained: "How one might 'laud unionism' * * * yet in these circumstances not imply an invitation, is hard to conceive. * * * Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim." 323 U.S. at 534-35. "When legislation or its application can confine labor leaders on such occasions to innocuous and abstract discussions of the virtues of trade unions and so becloud even this with doubt, uncertainty and the risk of penalty," this Court explained, "freedom of speech will be at an end." *Id.* at 536-37.

Rather than come to terms with *Thornhill* and *Thomas*, the court below brazenly declined to follow them. First, it contended that the cases are inapposite because "neither decision addressed the validity of a law prohibiting false or misleading speech." Pet. App. 24a. But that makes no sense, for, as Justice Brown recognized in her dissent (*id.* 60a), the question whether a statement is true has nothing to do with whether it is entitled to lesser constitutional protection because it is "commercial." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 266 (1964), for example, held that an editorial advertisement purchased by civil rights leaders to solicit financial support was fully protected by the First Amendment notwithstanding the fact that some of the statements it contained were unquestionably false. *Thornhill* and *Thomas* similarly hold that speech regarding labor conditions is entitled to the full protection of the First Amendment,

and that conclusion would have been unaffected if some of the labor exhortations in those cases had been false or misleading.

Second, the majority below contended that it could ignore *Thornhill* and *Thomas* because those decisions had been superceded by "the modern commercial speech doctrine" (Pet. App. 24a). That argument ignores the last half-century of First Amendment law. *Thornhill* and *Thomas* described a category of speech that was held subject to the full protection of the First Amendment decades before "purely commercial" speech received any constitutional protection at all (see *Valentine* v. *Christensen*, 316 U.S. 52 (1942)); later precedents only *expanded* the protection for commercial speech. Not surprisingly, then, far from suggesting the eclipse or demise of *Thornhill* and *Thomas*, this Court has cited those decisions with approval more than *one hundred and twenty five* times, including in many leading free speech precedents,[5] some quite recent.[6] *Thornhill* and *Thomas* undergird the recognition of the First Amendment right to speak on matters of importance[7] and, in particular, the right to engage in social protest that uses economic pressure to generate social change recognized in the line of cases spanning from *NAACP* v. *Button*, 371 U.S. 415, 430 (1963), to *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 908-11 (1982).

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[5] *E.g.*, *Cincinnati* v. *Discovery Network*, 507 U.S. 410, 421 (1993); *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 67, 68 n.15 (1983); *Va. State Bd. of Pharm.* v. *Va. Citizens Consumer Coun.*, 425 U.S. 748, 757 (1976); *Bigelow* v. *Virginia*, 421 U.S. 809 (1975).

[6] *E.g.*, *Watchtower Bible & Tract Soc'y* v. *Village of Stratton*, 122 S. Ct. 2080, 2082, 2088 (2002); *Bartnicki* v. *Vopper*, 532 U.S. 514, 534 (2001).

[7] *E.g.*, *Meyer* v. *Grant*, 468 U.S. 414, 421 (1988); *Pac. Gas & Elec. Co.* v. *Pub. Utils. Comm'n*, 475 U.S. 1, 8-9 (1986); *FCC* v. *League of Women Voters*, 468 U.S. 364, 381-82 (1984); *Con. Edison Co.* v. *Pub. Serv. Comm'n*, 447 U.S. 530, 534-35 (1980); *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 783 (1978); *Branzburg* v. *Hayes*, 408 U.S. 665, 705 n.40 (1972); *Time, Inc.* v. *Hill*, 385 U.S. 374, 388 (1967).

Certiorari should be granted to resolve the conflict between the California Supreme Court's decision and both this Court's commercial speech jurisprudence and its seminal decisions in *Thornhill* and *Thomas*.

II. Even If Factual Statements On Public Issues Can Be Characterized As "Commercial Speech," The Statutory Scheme Applied By California In This Case Conflicts With This Court's First Amendment Precedents.

The California Supreme Court concluded that, if corporations' statements on public issues can be characterized as "commercial speech," those statements can *eo ipso* be the subject of a suit for unfair trade practices and false advertising. That reasoning fails for two separate reasons.[8]

A. Because California Law Permits Suits Only Against Corporations Rather Than Their Accusers, The Decision Below Conflicts With This Court's Precedents Prohibiting Viewpoint Discrimination.

The California Supreme Court's definition of "commercial speech" is not only vastly overexpansive, but it is entirely one-sided as well. Despite the fact that consumers are equally likely to reach conclusions about whether a company's conduct is ethi-

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[8] As Justice Brown recognized in her dissent below, the assumption that all economically or commercially motivated speech can be treated "the *same* under the First Amendment" is unsustainable. Pet. App. 41a. Her view is consistent with this Court's admonition that "the diverse motives, means, and messages of advertising may make speech 'commercial' in widely varying degrees." *Bigelow* v. *Virginia*, 421 U.S. 809, 826 (1975). "Regardless of the particular label asserted by the State – whether it calls speech 'commercial' or 'commercial advertising' or 'solicitation' – a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." *Id.* Assertions that speech may be regulated or prohibited as "commercial" thus "must be examined carefully to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed." *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983).

cal on the basis of *accusations* against the company as by its *response*, the majority below held that only the latter could give rise to a suit for unfair trade practices and false advertising. The decision below thus conflicts with the bedrock rule that the government may not favor speech from a particular viewpoint. "There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard." *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972). Put another way, the California Supreme Court has impermissibly "license[d] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V.* v. *St. Paul*, 505 U.S. 377, 392 (1992).

The prohibition on viewpoint discrimination applies fully to the government's regulation of commercial speech. "[E]ven under the degree of scrutiny that [this Court has] applied in commercial speech cases, decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment." *Greater New Orleans B'casting Ass'n* v. *United States*, 527 U.S. 173, 193-94 (1993). In *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978), the Court applied this speech-equality principle to invalidate a state ordinance barring corporations, but not individuals, from making expenditures or contributions relating to referendum issues. "The inherent worth of the speech in terms of its capacity for informing the public," this Court explained, "does not depend upon the identity of its source, whether corporate, association, union, or individual." *Id.* at 777. "Especially where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended." *Id.* at 785-86. When the government "has limited the means by which [a corporation] may participate in the public debate on * * * controversial issues of national interest and importance," it "strikes at the heart of the freedom to speak." *Con. Edison Co.* v. *Pub. Serv. Comm'n*, 447 U.S. 530, 535 (1980).

The California Supreme Court admitted that its decision grants favored treatment to accusations against companies, but it

erroneously thought that result was the inevitable consequence of the commercial speech doctrine. The majority below reasoned that, while cases such as *Bose Corp.* v. *Consumers Union*, 466 U.S. 485 (1984), hold (or at least assume) that negative reviews of products are fully protected speech, "[a] commercial speaker's statements in praise or support of the same product, by comparison, are commercial speech." Pet. App. 27a. But even assuming that the lesser protections accorded to "commercial speech" apply to a seller's response to a product review that was itself fully protected by the First Amendment (a question this Court has never reached), that differential treatment results from the fact that the government has a distinct interest in regulating the company's statements when they are tied "inextricably" to the sale of a product. By contrast, accusations and responses not so tied to sales but instead addressed to corporations' operations implicate identical governmental interests, even if only the latter is labeled "commercial speech." "[D]iscrimination between commercial and noncommercial speech" is forbidden as a form of viewpoint discrimination when, as in this case, "the distinction bears no relationship whatsoever to the particular interests that the [government] has asserted." *Discovery Network*, 507 U.S. at 424 & n.20.

For similar reasons, the California Supreme Court was wrong to assert (Pet. App. 27a) that the prohibition against viewpoint discrimination is inapplicable when the government regulates only speech that supposedly receives "no protection" under the First Amendment – here, "false or misleading" commercial speech. That is precisely the argument rejected in *R.A.V.* v. *St. Paul*, 505 U.S. 377 (1992). The characterization of certain statements as "not within the area of constitutionally protected speech" means only that those statements "can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.) – not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content." *Id.* at 383-84. California thus cannot immunize from suit accusations regarding corporate operations while prohibiting

or holding actionable businesses' responses that implicate the same governmental interests.

B. Because Businesses Cannot Realistically Make Statements Of Opinion Without Mentioning Facts, The Decision Below Conflicts With This Court's Precedents According Full Protection To Commercial Speech That Is Inextricably Intertwined With Fully Protected Speech.

Certiorari is also warranted because the ruling below conflicts with this Court's holding that, when even purely commercial speech is "inextricably intertwined" with noncommercial speech on matters of public concern, "the entirety" of the speech must "be classified as noncommercial." *Fox*, 492 U.S. at 474; see also, *e.g.*, *Riley* v. *Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988). The California Supreme Court held that a corporation's statements of *fact* about its operations are commercial speech while its accompanying statements of *opinion* are fully protected by the First Amendment. That dichotomy lacks merit (*Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974)), but in any event, this Court's precedents reject the proposition that statements of fact and opinion can be segregated for constitutional purposes.

The majority below held that lessened First Amendment scrutiny applies because "[n]o law required Nike to combine factual representations about its own labor practices with expressions of opinion about economic globalization, nor was it impossible for Nike to address those subjects separately." Pet. App. 26a. But on any realistic assessment, Nike was under a "*practical* compulsion" (contra Pet. App. 26a (emphasis added) (citing *Fox*, 492 U.S. at 474)) to discuss its operations, which is all this Court's precedents require. It "would be both artificial and impractical" for a court to "parcel out the speech, applying one test to one phrase and another test to another phrase." *Id.* 37a-38a. If we permit the government to reduce public discussion "to innocuous and abstract discussions" about social issues, "freedom of speech will be at an end." *Thomas* v. *Collins*, 323 U.S. 516, 536-37 (1945).

In this case, for example, for petitioners to answer the claim that "Nike exemplifies the harms of globalization because it underpays workers" with the tepid response that "Nike believes globalization is in the abstract a good thing" would not address (and might even be taken to concede) the basic moral and political assertion inherent in the criticism – *viz.* that globalization is bad *because* it is accompanied by commercial exploitation of the sort allegedly exemplified by Nike. Furthermore, as Justice Brown observed in her dissent, Nike's factual statements about its overseas labor practices cannot be separated from the public issue because "Nike's overseas labor practices *are* the public issue." Pet. App. 56a-57a. "Thus, general statements about overseas labor and economic globalization do not provide Nike with a meaningful way to participate in the public debate over its overseas labor practices." *Id.* 57a.

That is not to say that an "advertiser" may "immunize false or misleading product information from government regulation simply by including references to public issues." *Bolger*, 463 U.S at 68. But the California Supreme Court's decision is not directed at such an artifice. There is no allegation that Nike attempted artificially to link otherwise commercial statements to a social issue. The fact that Nike's critics have linked Nike's products and practices to the public issue of globalization – so that it is now impossible, as a practical matter, for Nike to participate in that public debate without referring to its own products and practices – cannot strip Nike of the full protections normally afforded to core free speech.

III. The Decision Below Prohibits And Chills Protected Speech Far Beyond California's Borders in A Manner and to A Degree That Requires This Court's Immediate Review.

Not only is the decision below irreconcilable with this Court's First Amendment precedents, but it is essential that certiorari be granted now to resolve the conflict. For the reasons described above, the California Supreme Court's decision directly prohibits core free speech. But the profound chilling effect of the ruling is far more troubling still, because speakers

everywhere now labor under California's *post hoc*, strict liability regime, which applies to speech anywhere in the world by any enterprise that does business in that state. Not since *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), has this Court been confronted with a lower court ruling as profoundly destructive of free speech.

Nor is there any reason to defer review for the years that it will take to complete the proceedings on remand followed by a second round of review in the California appellate courts. No development on remand can alleviate the damage wrought by the decision below. Further, California's liability scheme is so outlandish that research has disclosed no other jurisdiction in the nation recognizing a cause of action that could give rise to litigation on similar issues and thereby generate a conflict in the lower courts for this Court to resolve. Thus, to leave standing the decision below would for the first time allow a single state to check-mate the conscious determination of every other sovereign in the United States to leave unregulated the sort of public speech at issue in this case. The resulting infringement on free speech with "each passing day constitute[s] an irreparable infringement of First Amendment values." *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 580 (1976) (Brennan, J., concurring in the judgment).

1. The decision below provides no protection even for the best-intentioned speaker: it imposes "strict liability" on a *post hoc* evaluation of the facts, accounting neither for the circumstances (such as the demand for an immediate comment regarding an imminent news report) nor for the fact that the defendant may have spoken only after first making its best efforts to verify the truth of its statement. See *supra* at 4. The California Supreme Court, moreover, failed to limit the available remedies to cease-and-desist orders forbidding further misstatements but approved a regime that contemplates requiring defendants to "disgorge" the supposedly ill-gotten gain of revenue somehow traceable to their statements and imposing a court-supervised campaign of corrective speech. See *supra* at 4-5.

In point of fact, the California Supreme Court has long construed the capacious remedial provisions of California's unfair

trade practices statute so as to "deter the defendant, and similar entities, from engaging in such practices in the future," stressing its commitment to "effectuate the full deterrent force" of the statute. *Fletcher* v. *Sec. Nat'l Bank*, 591 P.2d 51, 56-57 (Cal. 1979). The recognition by the majority below that "application of these laws may make Nike more cautious" (Pet. App. 25a) is just a backhanded acknowledgement that the statutory scheme is designed precisely to make corporations reticent to speak unless absolutely certain that all of their remarks will in hindsight be found truthful.

The chilling effect of such a scheme is patent. A corporation can assure its safety from a potentially devastating monetary award only by refusing to say anything at all. Although false statements as such are not affirmatively protected by the First Amendment, this Court has often noted that "a rule that would impose strict liability" on a speaker "for false factual assertions" regarding a matter of public concern "would have an undoubted 'chilling' effect" on speech "that *does* have constitutional value." *Hustler Magazine* v. *Falwell*, 485 U.S. 46, 52 (1988) (emphasis added). Recognizing that "erroneous statement is inevitable in free debate," this Court has held that error, too, "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.'" *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 272-73 (1964) (alteration and citation omitted).

The chilling effect of the California Supreme Court's decision is considerably heightened by the wide swath of speech it encompasses – both in subject-matter and in form. In contrast to government regulation of speech describing product qualities that are readily ascertainable by a corporation (*e.g.*, that a product is "Made in the U.S.A."), *Kasky* liability attaches to a corporation's discussion of almost any topic related to its own business practices that might matter to citizens as consumers – including but not limited to labor conditions, the environment, responsible investment, or community involvement. And, in contrast to government regulation of product labels and commercial advertising, California's scheme encompasses speech in any format and in any forum, including newspaper editorials, so long

as that speech is received in California. This case, for example, involves letters to the editor, op-eds, and editorial advertisements published around the country rather than principally in California. By the same token, virtually every statement by a corporation of any size that is placed on the Internet or carried in a substantial publication will give rise to an unavoidable risk of *Kasky* liability. Californians both consume almost everything (standing alone, that one state has the *world's* fifth-largest economy) and also receive all manner of media (its population of nearly 34 million is larger than that of many countries).

Indeed, the majority below went so far as to hold that the First Amendment does not protect even statements made to "persons (such as *reporters* or *reviewers*) [who are] likely to repeat the message to or otherwise influence actual buyers or customers." Pet. App. 18a (emphases added). Unable to know *ex ante* whether a press account will carry remarks accurately or completely, a corporation would be foolish to continue to provide information freely to the media. Kasky's suit against Oregon-based Nike over statements to *The New York Times* regarding commercial production in Southeast Asia is obviously just the beginning, for the decision below applies equally to statements by European and Asian manufacturers carried in the *Economist*, *Asian Wall Street Journal*, and *International Herald Tribune*. To leave standing a ruling permitting a state to "exert the power sought here over a wide variety of national publications or interstate newspapers carrying [speech] * * * * would impair, perhaps severely, the[] proper functioning" of the press and the free exchange of ideas generally. *Bigelow* v. *Virginia*, 421 U.S. 809, 828-29 (1975).

By so overreaching, the court below furthermore ensured that the chilling effect of its ruling would not be ameliorated by the "anti-freeze" that this Court in the past has associated with traditional "commercial speech":

- "Since *advertising* is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely." *Va. Pharm. Bd.* v. *Va. Consumer Coun.*, 425 U.S. 748, 772 n.24 (1976) (emphasis added). By contrast, a corporation faced with the prospect of *Kasky* li-

ability in an uncertain but potentially staggering amount can and will forgo or at the least limit speech on those broader social and moral issues that have a less direct impact on its bottom line.

- A corporation can with relatively little difficulty verify information regarding the "*product* and *its price*." *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 496 (1995) (Stevens, J., concurring) (quoting *Va. Bd.*, 425 U.S. at 777-78 (Stewart, J., concurring)) (emphases added). That information is entirely within the speaker's control and is publicly disseminated not on short notice but in advertisements generally planned well in advance. *Kasky* liability, by contrast, sweeps broadly enough to reach Nike's on-the-spot responses to accusations about any of the half-million individuals employed not by it, but by its subcontractors on the other side of the planet. Such responses (unlike the product and price promotions that a profit-motivated speaker can be counted on to address) would predictably be chilled first by delay while the speaker seeks to verify all the facts and then by silence inasmuch as no degree of effort suffices to protect the speaker from the strict liability of California law.

Other features of the California liability scheme aggravate the chilling effect of the California Supreme Court's decision. In particular, the decision below is not limited to claims brought by persons alleged to have been misled by a corporation's statements but invests every single California resident with the power of a "private attorney general." Under the relevant provisions of California law, "[a]llegations of actual deception, reasonable reliance, and damage are unnecessary." *Comm'n on Children's Television* v. *General Foods Corp.*, 673 P.2d 660, 668 (Cal. 1983). Everyone in California has the right to sue any corporation that happens to sell any product or service in that state over the accuracy of any statement bearing on that corporation's activities or on those of the businesses or nations with which it deals. Kasky, for example, alleges no injury and concedes he knows nothing about the facts but can still serve as plaintiff without bearing any costs under a contingent-fee arrangement with his lawyers. Provisions like these vastly increase the litigation exposure of any corporation that speaks (however indirectly) to California audiences. The "burden and

expense of litigating," without more, will "unduly impinge on the exercise of the constitutional right" by corporate speakers, making the dissemination of truthful information "the loser." *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 786 n.21 (1978) (citation and alteration omitted).

This extraordinary chilling effect is fact, not hypothesis or prediction. In light of the California Supreme Court's decision, Nike has substantially restricted its communications on social issues, including to national and international media that could reach California consumers. Among other things, Nike has determined that the risk of suits in California asserting the *Kasky* theory is too great to release publicly anywhere in the world its next annual Corporate Responsibility Report, the company's single most important document describing its initiatives and progress on matters such as labor compliance, community affairs, sustainable development, and workplace programs.

2. The profoundly harmful consequences of the decision below would not be offset in any respect by permitting this case to proceed in the lower courts for a determination "whether any false representations were made" (Pet. App. 2a) by petitioners. During any further proceedings, the California Supreme Court's decision of course remains a definitive statement of the law unless and until this Court says the contrary. No business – not even Nike – can take solace in the prospect that the particular statements involved in this one lawsuit might ultimately be held truthful, or at least insufficiently misleading or incomplete to be actionable under the California scheme, because that result would do nothing at all to diminish the ongoing threat of essentially identical inquisitions into the truth of the next set of statements (and the next, and the next, and so on *ad infinitum*) at the behest of any California citizen inclined to initiate such an inquisition as long as Nike or any other target chooses to defend itself in the media. And it is this ongoing threat, this Sword of Damocles, that works a forbidden chill of protected speech as long as this Court permits it to hang.

The California Supreme Court's judgment is thus "final" with respect to the federal constitutional questions presented by this petition, see 28 U.S.C. 1257(a), which are agreed by all to

be outcome determinative to the litigation and are properly brought before this Court now. See *Fort Wayne Books* v. *Indiana*, 489 U.S. 46, 55 (1988); *Cox B'casting Corp.* v. *Cohn*, 420 U.S. 469, 485-86 (1975); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 247 n.6 (1974). Indeed, given that petitioners' defense is that Kasky's lawsuit is flatly prohibited by the First Amendment and therefore must be dismissed at the outset, the questions presented are most appropriately resolved in precisely this posture.

Nor is there any real prospect that the questions presented could be ventilated in other jurisdictions, much less that a conflict would later emerge for this Court to resolve. The California Supreme Court's rejection of petitioners' First Amendment defense authoritatively extends that state's consumer protection statutes well beyond anything hitherto seen in American law. A comprehensive review of decisions under the federal Lanham Act and Federal Trade Commission Act, as well as the unfair trade practice and false advertising laws of the forty-nine other states, reveals that those provisions have *never* been extended *remotely* as far as was endorsed in this case. Only California confers the right to sue as private attorney general upon each of its citizens without regard to injury and holds the defendant corporation strictly liable for statements that neither appear in an advertising format nor refer to any product, even if they address a social issue that is the subject of an ongoing public debate.

Because neither the federal government nor any other state would be likely enough to recognize the cause of action asserted here to make the expense of suing anywhere but in California worth the candle, the question presented is exceedingly unlikely to arise in another state or federal court of appeals. Nor could the question even arise in the federal district courts of California and eventually the Ninth Circuit, for plaintiffs like Kasky employ the gambit of disavowing any injury from the outset precisely to preclude removal of their California tort suits to federal court. See, *e.g.*, *Mortera* v. *N. Am. Mortgage*, 172 F. Supp. 2d 1240 (N.D. Cal. 2001); *Toxic Injuries Corp.* v. *Safety-Kleen Corp.*, 57 F. Supp. 2d 947 (C.D. Cal. 1999); *Mangini* v. *R.J. Reynolds Tob.*, 793 F. Supp. 925 (N.D. Cal 1992).

Fortunately, the necessity of immediate review and the absence of any realistic prospect that the constitutional issues involved will be posed more suitably later in this litigation or in any other lawsuit are matched by the unique suitability of this case for resolving the questions presented. Petitioners and respondent are agreed that the constitutional questions presented are outcome determinative. See *supra* at 5. This case arises, moreover, not from a notice pleading, but instead from the detailed recitation in respondent Kasky's complaint of the full array of allegations of unethical behavior lodged against Nike, and of the assertedly false statements that petitioners made in response. Respondent has appended dozens of exhibits spanning more than 250 pages so that the statements can be reviewed in their context. See generally Pet. Lodging.

* * * *

The upshot of the foregoing is that the California Supreme Court's decision in this case, without regard to what might occur at trial or to what any other court might later hold, will continue, unless reviewed and reversed by this Court, to substantially restrict the communication of important information regarding a uniquely valuable perspective on hotly debated social issues, and it will do so far beyond California's borders. In the great majority of the cases on this Court's certiorari docket, the ruling of which review is sought has few tangible effects beyond the parties to the suit and might even be ameliorated by petitioner's vindication in later proceedings. The result is that, in those cases, certiorari can be denied and the question presented be safely allowed to percolate. Here, by contrast, the continuing prospect of liability under the *Kasky* holding casts a genuinely global pall over speech and will *continue* to cast that pall whatever happens on remand in this case and whatever any other court inferior to this one might hold. Certiorari accordingly should be granted now.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 14, 2002

APPENDIX

MARC KASKY,
Plaintiff and Appellant,

v.

NIKE, INC., et al.
Defendants and Respondents.

No. S087859

CALIFORNIA SUPREME COURT

May 2, 2002, Decided

OPINION

Acting on behalf of the public, plaintiff brought this action seeking monetary and injunctive relief under California laws designed to curb false advertising and unfair competition. Plaintiff alleged that defendant corporation, in response to public criticism, and to induce consumers to continue to buy its products, made false statements of fact about its labor practices and about working conditions in factories that make its products. Applying established principles of appellate review, we must assume in this opinion that these allegations are true.

The issue here is whether defendant corporation's false statements are commercial or noncommercial speech for purposes of constitutional free speech analysis under the state and federal Constitutions. Resolution of this issue is important because commercial speech receives a lesser degree of constitutional protection than many other forms of expression, and because governments may entirely prohibit commercial speech that is false or misleading.

Because the messages in question were directed by a commercial speaker to a commercial audience, and because they made representations of fact about the speaker's own business operations for the purpose of promoting sales of its products, we conclude that these messages are commercial speech for purposes of applying state laws barring false and misleading com-

mercial messages. Because the Court of Appeal concluded otherwise, we will reverse its judgment.

Our holding, based on decisions of the United States Supreme Court, in no way prohibits any business enterprise from speaking out on issues of public importance or from vigorously defending its own labor practices. It means only that when a business enterprise, to promote and defend its sales and profits, makes factual representations about its own products or its own operations, it must speak truthfully. Unlike our dissenting colleagues, we do not consider this a remarkable or intolerable burden to impose on the business community. We emphasize that this lawsuit is still at a preliminary stage, and that whether any false representations were made is a disputed issue that has yet to be resolved.

I. FACTS

This case comes before us after the superior court sustained defendants' demurrers to plaintiff's first amended complaint. We therefore begin by summarizing that complaint's allegations, accepting the truth of the allegations, as we must, for the limited purposes of reviewing the superior court's ruling. (See *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 885; accord, *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 807; *Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 957.)

A. Allegations of the First Amended Complaint

Plaintiff Marc Kasky is a California resident suing on behalf of the general public of the State of California under Business and Professions Code sections 17204 and 17535.[1] Defendant Nike, Inc. (Nike) is an Oregon corporation with its principal place of business in that state; Nike is authorized to do business in California and does promote, distribute, and sell its products in this state. The individual defendants (Philip Knight, Thomas Clarke, Mark Parker, Stephen Gomez, and David Taylor) are officers and/or directors of Nike.

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[1] Except as otherwise noted, unlabeled section references are to the Business and Professions Code.

Nike manufactures and sells athletic shoes and apparel. In 1997, it reported annual revenues of $9.2 billion, with annual expenditures for advertising and marketing of almost $1 billion. Most of Nike's products are manufactured by subcontractors in China, Vietnam, and Indonesia. Most of the workers who make Nike products are women under the age of 24. Since March 1993, under a memorandum of understanding with its subcontractors, Nike has assumed responsibility for its subcontractors' compliance with applicable local laws and regulations concerning minimum wage, overtime, occupational health and safety, and environmental protection.

Beginning at least in October 1996 with a report on the television news program *48 Hours*, and continuing at least through November and December of 1997 with the publication of articles in the Financial Times, the New York Times, the San Francisco Chronicle, the Buffalo News, the Oregonian, the Kansas City Star, and the Sporting News, various persons and organizations alleged that in the factories where Nike products are made workers were paid less than the applicable local minimum wage; required to work overtime; allowed and encouraged to work more overtime hours than applicable local law allowed; subjected to physical, verbal, and sexual abuse; and exposed to toxic chemicals, noise, heat, and dust without adequate safety equipment, in violation of applicable local occupational health and safety regulations.

In response to this adverse publicity, and for the purpose of maintaining and increasing its sales and profits, Nike and the individual defendants made statements to the California consuming public that plaintiff alleges were false and misleading. Specifically, Nike and the individual defendants said that workers who make Nike products are protected from physical and sexual abuse, that they are paid in accordance with applicable local laws and regulations governing wages and hours, that they are paid on average double the applicable local minimum wage, that they receive a "living wage," that they receive free meals and health care, and that their working conditions are in compliance with applicable local laws and regulations governing occupational health and safety. Nike and the individual defendants

made these statements in press releases, in letters to newspapers, in a letter to university presidents and athletic directors, and in other documents distributed for public relations purposes. Nike also bought full-page advertisements in leading newspapers to publicize a report that GoodWorks International, LLC., had prepared under a contract with Nike. The report was based on an investigation by former United States Ambassador Andrew Young, and it found no evidence of illegal or unsafe working conditions at Nike factories in China, Vietnam, and Indonesia.

Plaintiff alleges that Nike and the individual defendants made these false and misleading statements because of their negligence and carelessness and "with knowledge or reckless disregard of the laws of California prohibiting false and misleading statements."

B. Superior Court Proceedings

Based on these factual allegations, plaintiff's first amended complaint sought relief in the form of restitution requiring Nike to "disgorge all monies . . . acquired by means of any act found . . . to be an unlawful and/or unfair business practice," and relief in the form of an injunction requiring Nike to "undertake a Court-approved public information campaign" to correct any false or misleading statement, and to cease misrepresenting the working conditions under which Nike products are made. Plaintiff also sought reasonable attorney fees and costs and other relief that the court deemed just and proper.

Nike demurred to the first amended complaint on grounds, among others, that it failed to state facts sufficient to constitute a cause of action against Nike and that the relief plaintiff was seeking "is absolutely barred by the First Amendment to the United States Constitution and Article I, section 2(a) of the California Constitution." The individual defendants separately demurred to the first amended complaint on the same grounds.

On January 7, 1999, the superior court held a hearing on defendants' demurrers. At the hearing, the court stated that it considered the crucial question to be whether Nike's allegedly false and misleading statements noted in the first amended complaint constituted commercial or noncommercial speech, because the

answer to this question would determine the amount of protection the statements would receive under the federal and state constitutional free speech guarantees. After considering the arguments and authorities submitted by the parties, the court took the matter under submission and later sustained the demurrers without leave to amend. Plaintiff appealed from the judgment dismissing the complaint.

C. Court of Appeal Proceedings

The Court of Appeal affirmed the judgment. Like the superior court, the appellate court identified as the crucial issue whether Nike's allegedly false and misleading statements were commercial or noncommercial speech for purposes of analyzing the protections afforded by the First Amendment to the federal Constitution and by article I, section 2 of the California Constitution. Also like the superior court, the appellate court concluded that Nike's statements were noncommercial speech and therefore subject to the greatest measure of protection under the constitutional free speech provisions. The court stated that this determination "compels the conclusion that the trial court properly sustained the defendants' demurrer without leave to amend." We granted plaintiff's petition for review.

II. CALIFORNIA LAWS PROHIBITING CONSUMER DECEPTION

A. THE UNFAIR COMPETITION LAW

California's unfair competition law (UCL) (§ 17200 et seq.) defines "unfair competition" to mean and include "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [the false advertising law (§ 17500 et seq.)]." (§ 17200.) The UCL's purpose is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services. (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 110.)

The UCL's scope is broad. By defining unfair competition to include any "*unlawful* . . . business act or practice" (§ 17200, italics added), the UCL permits violations of other laws to be treated as unfair competition that is independently actionable. (*Cel-Tech*

Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 180.) Here, for instance, plaintiff's first amended complaint alleged that Nike and the individual defendants violated the UCL by committing actual fraud as defined in and prohibited by Civil Code section 1572 and deceit as defined in and prohibited by Civil Code sections 1709 and 1710. By defining unfair competition to include also any "*unfair or fraudulent* business act or practice" (§ 17200, italics added), the UCL sweeps within its scope acts and practices not specifically proscribed by any other law. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., supra,* at p. 180.) Plaintiff's first amended complaint also alleged a UCL violation of this type.

Not only public prosecutors, but also "any person acting for the interests of . . . the general public," may bring an action for relief under the UCL. (§ 17204.) Under this provision, a private plaintiff may bring a UCL action even when "the conduct alleged to constitute unfair competition violates a statute for the direct enforcement of which there is no private right of action." (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 565.) "This court has repeatedly recognized the importance of these private enforcement efforts." (*Kraus v. Trinity Management Services* (2000) 23 Cal.4th 116, 126.)

In a suit under the UCL, a public prosecutor may collect civil penalties, but a private plaintiff's remedies are "generally limited to injunctive relief and restitution." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., supra,* 20 Cal.4th at p. 179; see §§ 17203, 17206; *ABC Internat. Traders, Inc. v. Matsushita Electric Corp.* (1997) 14 Cal.4th 1247, 1268.) An order for restitution may require the defendant "to surrender all money obtained through an unfair business practice" including "all profits earned as a result of an unfair business practice." (*Kraus v. Trinity Management Services, Inc., supra,* 23 Cal.4th at p. 127.)

B. The False Advertising Law

California's false advertising law (§ 17500 et seq.) makes it "unlawful for any person, . . . corporation . . ., or any employee

thereof with intent directly or indirectly to dispose of real or personal property or to perform services . . . or to induce the public to enter into any obligation relating thereto, to make or disseminate . . . before the public in this state, . . . in any newspaper or other publication . . . or in any other manner or means whatever . . . any statement, concerning that real or personal property or those services . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading . . . ." (§ 17500.) Violation of this provision is a misdemeanor. (*Ibid.*) As with the UCL, an action for violation of the false advertising law may be brought either by a public prosecutor or by "any person acting for the interests of itself, its members or the general public," and the remedies available to a successful private plaintiff include restitution and injunctive relief. (§ 17535.)

C. Common Features of the UCL and the False Advertising Law

This court has recognized that "[a]ny violation of the false advertising law . . . necessarily violates" the UCL. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 210.) We have also recognized that these laws prohibit "not only advertising which is false, but also advertising which[,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public." (*Leoni v. State Bar* (1985) 39 Cal.3d 609, 626.) Thus, to state a claim under either the UCL or the false advertising law, based on false advertising or promotional practices, "it is necessary only to show that 'members of the public are likely to be deceived.' " (*Committee on Children's Television, Inc. v. General Foods Corp., supra,* 35 Cal.3d at p. 211; accord, *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267.)

III. CONSTITUTIONAL PROTECTIONS FOR SPEECH

A. Federal Constitution

1. Constitutional text and its application to state laws

The United States Constitution's First Amendment, part of the Bill of Rights, provides in part that "Congress shall make no law . . . abridging the freedom of speech . . . ." (U.S. Const., 1st

Amend.) Although by its terms this provision limits only Congress, the United States Supreme Court has held that the Fourteenth Amendment's due process clause makes the freedom of speech provision operate to limit the authority of state and local governments as well. (*McIntyre v. Ohio Elections Comm'n* (1995) 514 U.S. 334, 336, fn. 1.)

2. Constitutional protection of commercial speech

Although advertising has played an important role in our nation's culture since its early days, and although state regulation of commercial advertising and commercial transactions also has a long history, it was not until the 1970's that the United States Supreme Court extended First Amendment protection to commercial messages. In 1975, the court declared that it was error to assume "that advertising, as such, was entitled to no First Amendment protection." (*Bigelow v. Virginia* (1975) 421 U.S. 809, 825.) The next year, the court held that a state's complete ban on advertising prescription drug prices violated the First Amendment. (*Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S. 748, 770.) The high court observed that "the free flow of commercial information is indispensable" not only "to the proper allocation of resources in a free enterprise system" but also "to the formation of intelligent opinions as to how that system ought to be regulated or altered." (*Id.* at p. 765.)

3. Tests for commercial and noncommercial speech regulations

"[T]he [federal] Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression." (*Bolger v. Youngs Drug Products Corp.* (1983) 463 U.S. 60, 64-65 (*Bolger*).)

For noncommercial speech entitled to full First Amendment protection, a content-based regulation is valid under the First Amendment only if it can withstand strict scrutiny, which requires that the regulation be narrowly tailored (that is, the least restrictive means) to promote a compelling government interest. (*United States v. Playboy Entertainment Group, Inc.* (2000) 529 U.S. 803, 813; *Consolidated Edison Co. v. Public Serv. Comm'n* (1980) 447 U.S. 530, 540.)

"By contrast, regulation of commercial speech based on content is less problematic." (*Bolger, supra,* 463 U.S. at p. 65.) To determine the validity of a content-based regulation of commercial speech, the United States Supreme Court has articulated an intermediate-scrutiny test. The court first articulated this test in *Central Hudson Gas & Elec. v. Public Serv. Comm'n* (1980) 447 U.S. 557 (*Central Hudson*) and has since referred to it as the *Central Hudson* test. The court explained the components of the test this way: "At the outset, we must determine whether the expression is protected by the First Amendment. *For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading.* Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." (*Id.* at p. 566, italics added; accord, *Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, __ [121 S.Ct. 2404, 2421]; *Greater New Orleans Broadcasting Assn., Inc. v. United States* (1999) 527 U.S. 173, 183.) The court has clarified that the last part of the test—determining whether the regulation is not more extensive than "necessary"—does not require the government to adopt the least restrictive means, but instead requires only a "reasonable fit" between the government's purpose and the means chosen to achieve it. (*Board of Trustees, State Univ. of N.Y. v. Fox* (1989) 492 U.S. 469, 480.)

4. Regulation of false or misleading speech

"[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open debate on public issues.' " (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 340.) For this reason, "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake." (*Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. at p. 771.)

Nevertheless, in some instances the First Amendment imposes restraints on lawsuits seeking damages for injurious falsehoods. It does so "to eliminate the risk of undue self-censorship

and the suppression of truthful material" (*Herbert v. Lando* (1979) 441 U.S. 153, 172) and thereby to give freedom of expression the " 'breathing space' " it needs to survive (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 272; *Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 513). Thus, "some false and misleading statements are entitled to First Amendment protection in the political realm." (*Rubin v. Coors Brewing Co.* (1995) 514 U.S. 476, 495 (conc. opn. of Stevens, J.).)

But the United States Supreme Court has explained that the First Amendment's protection for false statements is not universal. (See *Dun & Bradstreet, Inc. v. Greenmoss Builders* (1985) 472 U.S. 749, 762 (plur. opn. of Powell, J.) [stating that when speech "concerns no public issue" and is "wholly false and clearly damaging," it "warrants no special protection" under the First Amendment].) In particular, commercial speech that is false or misleading is not entitled to First Amendment protection and "may be prohibited entirely." (*In re R.M.J.* (1982) 455 U.S. 191, 203; see also *Edenfield v. Fane* (1993) 507 U.S. 761, 768 [observing that "the State may ban commercial expression that is fraudulent or deceptive without further justification"]; *Bolger, supra,* 463 U.S. at p. 69 [observing that "[t]he State may deal effectively with false, deceptive, or misleading sales techniques"]; *Zauderer v. Office of Disciplinary Counsel* (1985) 471 U.S. 626, 638 [observing that "[t]he States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading"]; *Central Hudson, supra,* 447 U.S. at p. 566 [stating that for commercial speech to come within First Amendment protection "it . . . must . . . not be misleading"]; *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 383 [stating that "the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena"].)

With regard to misleading commercial speech, the United States Supreme Court has drawn a distinction between, on the one hand, speech that is actually or inherently misleading, and, on the other hand, speech that is only potentially misleading. Actually or inherently misleading commercial speech is treated

the same as false commercial speech, which the state may prohibit entirely. (*In re R.M.J., supra,* 455 U.S. at p. 203; *Ibanez v. Florida Dept. of Business & Professional Regulation, Bd. of Accountancy* (1994) 512 U.S. 136, 150.) By comparison, "[s]tates may not completely ban potentially misleading speech if narrower limitations can ensure that the information is presented in a nonmisleading manner." (*Ibanez v. Florida Dept. of Business & Professional Regulation, Bd. of Accountancy, supra,* at p. 152; see also *Peel v. Attorney Reg. & Disciplinary Comm'n* (1990) 496 U.S. 91, 100; *In re R.M.J., supra,* at p. 203.)

As one Supreme Court Justice has remarked, "the elimination of false and deceptive claims serves to promote the one facet of commercial price and product advertising that warrants First Amendment protection—its contribution to the flow of accurate and reliable information relevant to public and private decisionmaking." (*Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. at p. 781 (conc. opn. of Stewart, J.); see also *44 Liquormart, Inc. v. Rhode Island* (1996) 517 U.S. 484, 496, 501 (plur. opn. of Stevens, J.).) Thus, the high court has acknowledged that state laws may require a commercial message to "appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive." (*Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. at p. 772, fn. 24.) In the court's words, "[t]he First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flow[s] cleanly as well as freely." (*Id.* at pp. 771-772.)

5. Reasons for the distinction

The United States Supreme Court has given three reasons for the distinction between commercial and noncommercial speech in general and, more particularly, for withholding First Amendment protection from commercial speech that is false or actually or inherently misleading.

First, "[t]he truth of commercial speech . . . may be *more easily verifiable by its disseminator* than . . . news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that

he himself provides and presumably knows more about than anyone else." (*Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. at p. 772, fn. 24, italics added; see also *id.* at p. 777 (conc. opn. of Stewart, J.) [stating that "[t]he advertiser's access to the truth about his product and its price substantially eliminates any danger that governmental regulation of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression"]; accord, *44 Liquormart, Inc. v. Rhode Island, supra*, 517 U.S. at p. 499 (plur. opn. of Stevens, J.); *Dun & Bradstreet, Inc. v. Greenmoss Builders, supra,* 472 U.S. at p. 758, fn. 5 (plur. opn. of Powell, J.); *Bose Corp. v. Consumers Union of U.S., Inc., supra,* 466 U.S. at p. 504, fn. 22.)

Second, commercial speech is *hardier* than noncommercial speech in the sense that commercial speakers, because they act from a profit motive, are less likely to experience a chilling effect from speech regulation. (*Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. at p. 772, fn. 24 [stating that "since advertising is the *Sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely"]; accord, *44 Liquormart, Inc. v. Rhode Island, supra*, 517 U.S. at p. 499 (plur. opn. of Stevens, J.); *Board of Trustees, State Univ. of N.Y. v. Fox, supra,* 492 U.S. at p. 481; *Dun & Bradstreet, Inc. v. Greenmoss Builders, supra,* 472 U.S. at p. 758, fn. 5 (plur. opn. of Powell, J.).)

Third, governmental authority to regulate commercial transactions to prevent commercial harms justifies a power to regulate speech that is " 'linked inextricably' to those transactions." (*44 Liquormart, Inc. v. Rhode Island, supra*, 517 U.S. at p. 499 (plur. opn. of Stevens, J.); *Edenfield v. Fane, supra,* 507 U.S. at p. 767; *Friedman v. Rogers* (1979) 440 U.S. 1, 10, fn. 9.) The high court has identified "preventing commercial harms" as "the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech" (*Cincinnati v. Discovery Network, Inc.* (1993) 507 U.S. 410, 426), and it has explained that "[t]he interest in preventing commercial harms justifies more intensive regulation of commercial speech than noncommercial speech even when they are intermingled in

the same publications" (*id.* at p. 426, fn. 21). (See also *Rubin v. Coors Brewing Co., supra,* 514 U.S. at p. 496 (conc. opn. of Stevens, J.) [stating that "[t]he evils of false commercial speech, which may have an immediate harmful impact on commercial transactions, together with the ability of purveyors of commercial speech to control falsehoods, explains why we tolerate more governmental regulation of this speech than of most other speech"].)

6. Distinguishing commercial from noncommercial speech

The United States Supreme Court has stated that the category of commercial speech consists at its core of " 'speech proposing a commercial transaction.' " (*Central Hudson, supra,* 447 U.S. at p. 562; *Bolger, supra,* 463 U.S. at p. 66.) Although in one case the court said that this description was "the test for identifying commercial speech" (*Board of Trustees, State Univ. of N.Y. v. Fox, supra,* 492 U.S. at pp. 473-474), in other decisions the court has indicated that the category of commercial speech is not limited to this core segment. For example, the court has accepted as commercial speech a statement of alcohol content on the label of a beer bottle (*Rubin v. Coors Brewing Co., supra,* 514 U.S. at pp. 481-482), as well as statements on an attorney's letterhead and business cards identifying the attorney as a CPA (certified public accountant) and CFP (certified financial planner) (*Ibanez v. Florida Dept. of Business & Professional Regulation, Bd. of Accountancy, supra,* 512 U.S. at p. 142).

Bolger, supra, 463 U.S. 60, presented the United States Supreme Court with the question whether a federal law prohibiting the mailing of unsolicited advertisements for contraceptives violated the federal Constitution's free speech provision as applied to certain mailings by a corporation that manufactured, sold, and distributed contraceptives. One category of mailings consisted of "informational pamphlets discussing the desirability and availability of prophylactics in general or [the corporation's] products in particular." (*Id.* at p. 62, fn. omitted.) The court noted that these pamphlets did not merely propose commercial

transactions. (*Id.* at p. 66.) Although the pamphlets were conceded to be advertisements, that fact alone did not make them commercial speech because paid advertisements are sometimes used to convey political or other messages unconnected to a product or service or commercial transaction. (*Ibid.*, citing *New York Times Co. v. Sullivan, supra,* 376 U.S. at pp. 265-266.) The court also found that references to specific products and the economic motivation of the speaker were each, considered in isolation, insufficient to make the pamphlets commercial speech. (*Bolger, supra,* at pp. 66-67.) The court concluded, however, that the *combination* of these three factors—advertising format, product references, and commercial motivation—provided "strong support" for characterizing the pamphlets as commercial speech. (*Id.* at p. 67.)

In two important footnotes, the high court provided additional insight into the distinction between commercial and noncommercial speech. In one footnote, the court gave this caution: "[We do not] mean to suggest that each of the characteristics present in this case must necessarily be present in order for speech to be commercial. For example, we express no opinion as to whether reference to any particular product or service is a necessary element of commercial speech." (*Bolger, supra,* 463 U.S. at p. 67, fn. 14.)

In the other footnote, after observing that one of the pamphlets at issue discussed condoms in general without referring specifically to the corporation's own products, the court said: "That a product is referred to generically does not, however, remove it from the realm of commercial speech. For example, a company with sufficient control of the market for a product may be able to promote the product without reference to its own brand names. Or a trade association may make statements about a product without reference to specific brand names." (*Bolger, supra,* 463 U.S. at p. 66, fn. 13.)

Thus, although the court in *Bolger, supra,* 463 U.S. 60, identified three factors—advertising format, product references, and commercial motivation—that in combination supported a characterization of commercial speech in that case, the court not only rejected the notion that any of these factors is *sufficient* by itself,

but it also declined to hold that all of these factors in combination, or any one of them individually, is *necessary* to support a commercial speech characterization.

The high court also cautioned, as it had in past cases, that statements may properly be categorized as commercial "notwithstanding the fact that they contain discussions of important public issues," and that "advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech," explaining further that "[a]dvertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." (*Bolger, supra,* 463 U.S. at pp. 67-68, fn. omitted; accord, *Board of Trustees, State Univ. of N.Y. v. Fox, supra,* 492 U.S. 469, 475; *Zauderer v. Office of Disciplinary Counsel, supra,* 471 U.S. at p. 637, fn. 7; see also *Greater New Orleans Broadcasting v. U.S., supra,* 527 U.S. at p. 184 [recognizing that commercial speech may concern a "subject of intense public debate"].)

Since its decision in *Bolger, supra,* 463 U.S. 60, the United States Supreme Court has acknowledged that "ambiguities may exist at the margins of the category of commercial speech." (*Edenfield v. Fane, supra,* 507 U.S. at p. 765; see also *Cincinnati v. Discovery Network, Inc., supra,* 507 U.S. at p. 419 [recognizing "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category"]; *Zauderer v. Office of Disciplinary Counsel, supra,* 471 U.S. at p. 637 [stating that "the precise bounds of the category of . . . commercial speech" are "subject to doubt, perhaps"].) Justice Stevens in particular has remarked that "the borders of the commercial speech category are not nearly as clear as the Court has assumed" (*Rubin v. Coors Brewing Co., supra,* 514 U.S. at p. 493 (conc. opn. of Stevens, J.)), and he has suggested that the distinction cannot rest solely on the form or content of the statement, or the motive of the speaker, but instead must rest on the relationship between the speech at issue and the justification for distinguishing commercial from noncommercial speech. In his words, "any description of commercial speech that is intended to identify the category of speech entitled to less First Amendment

protection should relate to the reasons for permitting broader regulation: namely, commercial speech's potential to mislead." (*Id.* at p. 494 (conc. opn. of Stevens, J.).)

B. The State Constitution

1. Constitutional text

The California Constitution's article I, entitled the Declaration of Rights, guarantees freedom of speech in subdivision (a) of section 2. It provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right. A law may not restrain or abridge liberty of speech or press." (Cal. Const., art. I, § 2, subd. (a).)

2. Scope of the state constitutional provision

The state Constitution's free speech provision is "at least as broad" as (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 490) and in some ways is broader than (*id.* at p. 491; *Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1041) the comparable provision of the federal Constitution's First Amendment.

3. Commercial speech protection under the state Constitution

The state Constitution's free speech provision, which provides that "[e]very person may freely speak . . . *on all subjects*" (Cal. Const., art. I, § 2, subd. (a), italics added), protects commercial speech, at least when such speech is "in the form of truthful and nonmisleading messages about lawful products and services." (*Gerawan Farming, Inc. v. Lyons, supra,* 24 Cal.4th at p. 493.) This court has indicated, however, that our state Constitution does not prohibit the imposition of sanctions for misleading commercial advertisements. (*In re Morse* (1995) 11 Cal.4th 184, 200, fn. 4.) Allowing such sanctions is consistent with the text of the state constitutional provision, which makes anyone who "abuse[s]" the right of freedom of speech "responsible" for the misconduct. (Cal. Const., art. I, § 2, subd. (a); see *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 746.) Our Courts of Appeal have held that neither the UCL nor the false advertising law on its face violates the state Constitution's free speech provision as an impermissible regulation of commercial speech. (*People v. Superior Court (Olson)* (1979) 96 Cal.App.3d 181, 195, cert. den. (1980) 446 U.S. 935; accord, *Keimer v. Buena Vista Books, Inc.* (1999) 75 Cal.App.4th 1220, 1230, fn. 10.)

This court has never suggested that the state and federal Constitutions impose *different boundaries* between the categories of commercial and noncommercial speech. In our most recent decision on this point, *Leoni v. State Bar, supra,* 39 Cal.3d 609 (*Leoni*), this court addressed whether an attorney's solicitation of clients by means of allegedly misleading mass mailings and information was protected by the free speech provisions of the United States and California Constitutions. We used the same analysis for both constitutional provisions. (*Id.* at p. 614, fn. 2.) To determine whether the attorney's mailings were commercial or noncommercial speech, we relied on the three factors that the United States Supreme Court had used in *Bolger, supra,* 463 U.S. 60: advertising format, product references, and economic motivation. After concluding that two of these factors were present (because the mailings referred specifically to the attorney's services and the attorney had an economic motivation in sending them), we concluded that the presence of these two factors was sufficient to make the mailings commercial speech for purposes of the free speech protections of both the federal and the state Constitutions. (*Leoni, supra,* at pp. 623-624.)

IV. ANALYSIS

A. The United States Constitution

The United States Supreme Court has not adopted an all-purpose test to distinguish commercial from noncommercial speech under the First Amendment, nor has this court adopted such a test under the state Constitution, nor do we propose to do so here. A close reading of the high court's commercial speech decisions suggests, however, that it is possible to formulate a limited-purpose test. We conclude, therefore, that *when a court must decide whether particular speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception*, categorizing a particular statement as commercial or noncommercial speech requires consideration of three ele-

ments: the speaker, the intended audience, and the content of the message.

In typical commercial speech cases, the *speaker* is likely to be someone engaged in commerce—that is, generally, the production, distribution, or sale of goods or services—or someone acting on behalf of a person so engaged, and the *intended audience* is likely to be actual or potential buyers or customers of the speaker's goods or services, or persons acting for actual or potential buyers or customers, or persons (such as reporters or reviewers) likely to repeat the message to or otherwise influence actual or potential buyers or customers. Considering the identity of both the speaker and the target audience is consistent with, and implicit in, the United States Supreme Court's commercial speech decisions, each of which concerned a speaker engaged in the sale or hire of products or services conveying a message to a person or persons likely to want, and be willing to pay for, that product or service. The high court has frequently spoken of commercial speech as speech proposing a commercial transaction (e.g., *Central Hudson, supra,* 447 U.S. at p. 562), thus implying that commercial speech typically is communication between persons who engage in such transactions.

In *Bolger*, moreover, the court stated that in deciding whether speech is commercial two relevant considerations are advertising format and economic motivation. (*Bolger, supra,* 463 U.S. at pp. 66-67.) These considerations imply that commercial speech generally or typically is directed to an audience of persons who may be influenced by that speech to engage in a commercial transaction with the speaker or the person on whose behalf the speaker is acting. Speech in advertising format typically, although not invariably, is speech about a product or service by a person who is offering that product or service at a price, directed to persons who may want, and be willing to pay for, that product or service. Citing *New York Times v. Sullivan, supra,* 376 U.S. 254, which concerned a newspaper advertisement seeking contributions for civil rights causes, the court cautioned, however, that presentation in advertising format does not necessarily establish that a message is commercial in character. (*Bolger, supra,* at p. 66.) Economic motivation likewise implies

that the speech is intended to lead to commercial transactions, which in turn assumes that the speaker and the target audience are persons who will engage in those transactions, or their agents or intermediaries.

Finally, the factual content of the message should be commercial in character. In the context of regulation of false or misleading advertising, this typically means that the speech consists of representations of fact about the business operations, products, or services of the speaker (or the individual or company that the speaker represents), made for the purpose of promoting sales of, or other commercial transactions in, the speaker's products or services. This is consistent with, and implicit in, the United States Supreme Court's commercial speech decisions, each of which has involved statements about a product or service, or about the operations or qualifications of the person offering the product or service. (See, e.g., *Rubin v. Coors Brewing Co., supra,* 514 U.S. 476 [statement of alcohol content on beer bottle label]; *Ibanez v. Florida Dept. of Business & Professional Regulation, Bd. of Accountancy, supra,* 512 U.S. 136 [statements on an attorney's letterhead and business cards describing attorney's qualifications]; *Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. 748 [advertisements showing prices of prescription drugs].)

This is also consistent with the third *Bolger* factor—product references. By "product references," we do not understand the United States Supreme Court to mean only statements about the price, qualities, or availability of individual items offered for sale. Rather, we understand "product references" to include also, for example, statements about the manner in which the products are manufactured, distributed, or sold, about repair or warranty services that the seller provides to purchasers of the product, or about the identity or qualifications of persons who manufacture, distribute, sell, service, or endorse the product. Similarly, references to services would include not only statements about the price, availability, and quality of the services themselves, but also, for example, statements about the education, experience, and qualifications of the persons providing or endorsing the services. (See, e.g., *Ibanez v. Florida Dept. of*

Business & Professional Regulation, Bd. of Accountancy, supra, 512 U.S. 136 [statements on an attorney's letterhead and business cards describing attorney's training and qualifications].) This broad definition of "product references" is necessary, we think, to adequately categorize statements made in the context of a modern, sophisticated public relations campaign intended to increase sales and profits by enhancing the image of a product or of its manufacturer or seller.

Our understanding of the content element of commercial speech is also consistent with the reasons that the United States Supreme Court has given for denying First Amendment protection to false or misleading commercial speech. The high court has stated that false or misleading commercial speech may be prohibited because the truth of commercial speech is "more easily verifiable by its disseminator" and because commercial speech, being motivated by the desire for economic profit, is less likely than noncommercial speech to be chilled by proper regulation. (*Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. at p. 772, fn. 24.) This explanation assumes that commercial speech consists of factual statements and that those statements describe matters within the personal knowledge of the speaker or the person whom the speaker is representing and are made for the purpose of financial gain. Thus, this explanation implies that, at least in relation to regulations aimed at protecting consumers from false and misleading promotional practices, commercial speech must consist of factual representations about the business operations, products, or services of the speaker (or the individual or company on whose behalf the speaker is speaking), made for the purpose of promoting sales of, or other commercial transactions in, the speaker's products or services. The United States Supreme Court has never decided whether false statements about a product or service of a competitor of the speaker would properly be categorized as commercial speech. Because the issue is not presented here, we offer no view on how it should be resolved.

Apart from this consideration of the identities of the speaker and the audience, and the contents of the speech, we find nothing in the United States Supreme Court's commercial speech

decisions that is essential to a determination that particular speech is commercial in character in the context of a consumer protection law intended to suppress false or deceptive commercial messages. Although in *Bolger, supra,* 463 U.S. 60, the United States Supreme Court noted that the speech at issue there was in a traditional advertising format, the court cautioned that it was not holding that this factor would always be necessary to the characterization of speech as commercial, and in *Leoni, supra,* 39 Cal.3d 609, this court held that an attorney's mailings were commercial speech even though they were not in the form of an advertisement. (See also *Ibanez v. Florida Dept. of Business & Professional Regulation, Bd. of Accountancy, supra,* 512 U.S. 136 [accepting as commercial speech statements on an attorney's letterhead and business cards].) Thus, advertising format is by no means essential to characterization as commercial speech.

Here, the first element—a commercial speaker—is satisfied because the speakers—Nike and its officers and directors—are engaged in commerce. Specifically, they manufacture, import, distribute, and sell consumer goods in the form of athletic shoes and apparel.

The second element—an intended commercial audience—is also satisfied. Nike's letters to university presidents and directors of athletic departments were addressed directly to actual and potential purchasers of Nike's products, because college and university athletic departments are major purchasers of athletic shoes and apparel. Plaintiff has alleged that Nike's press releases and letters to newspaper editors, although addressed to the public generally, were also intended to reach and influence actual and potential purchasers of Nike's products. Specifically, plaintiff has alleged that Nike made these statements about its labor policies and practices "to maintain and/or increase its sales and profits." To support this allegation, plaintiff has included as an exhibit a letter to a newspaper editor, written by Nike's director of communications, referring to Nike's labor policies practices and stating that "[c]onsumers are savvy and want to know they support companies with good products and practices" and that "[d]uring the shopping season, we encourage shoppers to

remember that Nike is the industry's leader in improving factory conditions."

The third element—representations of fact of a commercial nature—is also present. In describing its own labor policies, and the practices and working conditions in factories where its products are made, Nike was making factual representations about its own business operations. In speaking to consumers about working conditions and labor practices in the factories where its products are made, Nike addressed matters within its own knowledge. The wages paid to the factories' employees, the hours they work, the way they are treated, and whether the environmental conditions under which they work violate local health and safety laws, are all matters likely to be within the personal knowledge of Nike executives, employees, or subcontractors. Thus, Nike was in a position to readily verify the truth of any factual assertions it made on these topics.

In speaking to consumers about working conditions in the factories where its products are made, Nike engaged in speech that is particularly hardy or durable. Because Nike's purpose in making these statements, at least as alleged in the first amended complaint, was to maintain its sales and profits, regulation aimed at preventing false and actually or inherently misleading speech is unlikely to deter Nike from speaking truthfully or at all about the conditions in its factories. To the extent that application of these laws may make Nike more cautious, and cause it to make greater efforts to verify the truth of its statements, these laws will serve the purpose of commercial speech protection by "insuring that the stream of commercial information flow[s] cleanly as well as freely." (*Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. at pp. 772.)

Finally, government regulation of Nike's speech about working conditions in factories where Nike products are made is consistent with traditional government authority to regulate commercial transactions for the protection of consumers by preventing false and misleading commercial practices. Trade regulation laws have traditionally sought to suppress and prevent not only false or misleading statements about products or services in themselves but also false or misleading statements about where a

product was made (see § 17533.7 [making it unlawful to sell a product falsely labeled as "Made in U.S.A."]; 15 U.S.C. § 1125(a) [allowing damages for "false designation of origin"]), or by whom (see § 17520 et seq. [prohibiting false representation of product as made by blind workers]; § 17569 [prohibiting false representation of product "as made by authentic American Indian labor or workmanship"]; Lab. Code, § 1010 et seq. [prohibiting false labeling about the kind, character, or nature of labor employed in product's manufacture]).

Because in the statements at issue here Nike was acting as a commercial speaker, because its intended audience was primarily the buyers of its products, and because the statements consisted of factual representations about its own business operations, we conclude that the statements were commercial speech for purposes of applying state laws designed to prevent false advertising and other forms of commercial deception. Whether these statements could properly be categorized as commercial speech for some other purpose, and whether these statements could properly be categorized as commercial speech if one or more of these elements was not fully satisfied, are questions we need not decide here.

Nike argues that its allegedly false and misleading statements were not commercial speech because they were part of "an international media debate on issues of intense public interest." In a similar vein, our dissenting colleagues argue that the speech at issue here should not be categorized as commercial speech because, when Nike made the statements defending its labor practices, the nature and propriety of those practices had already become a matter of public interest and public debate. (Dis. opn. of Chin, J., *post*, at p. 6; dis. opn. of Brown, J., *post*, at pp. 4, 7-9.) This argument falsely assumes that speech cannot properly be categorized as commercial speech if it relates to a matter of significant public interest or controversy. As the United States Supreme Court has explained, commercial speech commonly concerns matters of intense public and private interest. The individual consumer's interest in the price, availability, and characteristics of products and services "may be as keen, if not keener by far, than his interest in the day's most urgent po-

litical debate." (*Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. at p. 763.) And for the public as whole, information on commercial matters is "indispensable" not only "to the proper allocation of resources in a free enterprise system" but also "to the formation of intelligent opinions as to how that system ought to be regulated or altered." (*Id.* at p. 765; see also *Greater New Orleans Broadcasting Assn., Inc. v. United States, supra,* 527 U.S. at p. 184 [observing that the commercial speech at issue there concerned "an activity that is the subject of intense debate in many communities"].)

In her dissent, Justice Brown states that our logic "erroneously assumes that false or misleading commercial speech . . . can never be speech about a public issue." (Dis. opn. of Brown, J., *post*, at p. 9.) On the contrary, we assume that commercial speech frequently and even normally addresses matters of public concern. The reason that it is "less necessary to tolerate inaccurate statements for fear of silencing the speaker" of commercial speech is not that such speech concerns matters of lesser public interest or value, but rather that commercial speech is both "more easily verifiable by its disseminator" and "less likely to be chilled by proper regulation." (*Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. at p. 772, fn. 24; accord, *Lorillard Tobacco Co. v. Reilly, supra,* 533 U.S. at p. __ [121 S.Ct. at p. 2433].)

In support of their argument that speech about issues of public importance or controversy must be considered noncommercial speech, our dissenting colleagues cite *Thomas v. Collins* (1945) 323 U.S. 516, and *Thornhill v. State of Alabama* (1940) 310 U.S. 88. The United States Supreme Court issued these decisions three decades before it developed the modern commercial speech doctrine in *Bigelow v. Virginia, supra,* 421 U.S. 809, and *Va. Pharmacy Bd. V. Va. Consumer Council, supra,* 425 U.S. 748. Moreover, neither decision addressed the validity of a law prohibiting false or misleading speech. To the extent they hold that truthful and nonmisleading speech about commercial matters of public importance is entitled to constitutional protection, they are consistent with the modern commercial speech doctrine and with the decision we reach today. We find nothing

in either decision suggesting that the state lacks the authority to prohibit false and misleading factual representations, made for purposes of maintaining and increasing sales and profits, about the speaker's own products, services, or business operations.

For purposes of categorizing Nike's speech as commercial or noncommercial, it does not matter that Nike was responding to charges publicly raised by others and was thereby participating in a public debate. The point is illustrated by a decision of a federal court of appeals about statements by a trade association denying there was scientific evidence that eating eggs increased the risk of heart and circulatory disease. (*National Commission on Egg Nutrition v. Federal Trade Commission* (7th Cir. 1977) 570 F.2d 157, 159, cert. den. (1978) 439 U.S. 821.) The court held that these statement were commercial speech subject to regulation by the Federal Trade Commission (FTC) to the extent the statements were false or misleading, even though the trade association made the statements "to counteract what the FTC described as 'anti-cholesterol attacks on eggs which had resulted in steadily declining per capita egg consumption.' " (*Id.* at p. 159.) Responding to the argument that the statements were noncommercial because they concerned a debate on a matter of great public interest, the federal court of appeals responded that "the right of government to restrain false advertising can hardly depend upon the view of an agency or court as to the relative importance of the issue to which the false advertising relates." (*Id.* at p. 163.)

Here, Nike's speech is not removed from the category of commercial speech because it is intermingled with noncommercial speech. To the extent Nike's press releases and letters discuss policy questions such as the degree to which domestic companies should be responsible for working conditions in factories located in other countries, or what standards domestic companies ought to observe in such factories, or the merits and effects of economic "globalization" generally, Nike's statements are noncommercial speech. Any content-based regulation of these noncommercial messages would be subject to the strict scrutiny test for fully protected speech. (See, e.g., *Consolidated Edison Co. v. Public Serv. Comm'n, supra,* 447 U.S. 530.) But

Nike may not "immunize false or misleading product information from government regulation simply by including references to public issues." (*Bolger, supra,* 463 U.S. at p. 68, fn. omitted.) Here, the alleged false and misleading statements all relate to the commercial portions of the speech in question—the description of actual conditions and practices in factories that produce Nike's products—and thus the proposed regulations reach only that commercial portion.

Asserting that the commercial and noncommercial elements in Nike's statement were "inextricably intertwined," our dissenting colleagues maintain that it must therefore be categorized as noncommercial speech, and they cite in support the United States Supreme Court's decision in *Riley v. National Federation of the Blind of North Carolina* (1988) 487 U.S. 781 (*Riley*). That decision concerned regulation of charitable solicitations, a category of speech that does not fit within our limited-purpose definition of commercial speech because it does not involve factual representations about a product or service that is offered for sale. More importantly, the high court has since explained that in *Riley* "the commercial speech (if it was that) was 'inextricably intertwined' because the state law required it to be included" and that commercial and noncommercial messages are not "inextricable" unless there is some legal or practical compulsion to combine them. (*Board of Trustees, State Univ. of N.Y. v. Fox, supra,* 492 U.S. at p. 474, italics omitted.) No law required Nike to combine factual representations about its own labor practices with expressions of opinion about economic globalization, nor was it impossible for Nike to address those subjects separately.

We also reject Nike's argument that regulating its speech to suppress false and misleading statements is impermissible because it would restrict or disfavor expression of one point of view (Nike's) and not the other point of view (that of the critics of Nike's labor practices). The argument is misdirected because the regulations in question do not suppress points of view but instead suppress false and misleading statements of fact. As we have explained, to the extent Nike's speech represents expression of opinion or points of view on general policy questions such as the value of economic "globalization," it is noncommercial speech subject to full First Amendment protection. Nike's speech loses that full measure of protection only when it concerns facts material to commercial transactions—here, factual statements about how Nike makes its products.

Moreover, differential treatment of speech about products and services based on the identity of the speaker is inherent in the commercial speech doctrine as articulated by the United States Supreme Court. A noncommercial speaker's statements criticizing a product are generally noncommercial speech, for which damages may be awarded only upon proof of both falsehood and actual malice. (See, e.g., *Bose Corp. v. Consumers Union of U.S., Inc., supra,* 466 U.S. at p. 513 [so treating unflattering statements in a consumer magazine's review of high fidelity speakers].) A commercial speaker's statements in praise or support of the same product, by comparison, are commercial speech that may be prohibited entirely to the extent the statements are either false or actually or inherently misleading. (*In re R.M.J., supra,* 455 U.S. at p. 203.) To repeat, the justification for this different treatment, as the high court has explained, is that when a speaker promotes its own products, it is "less necessary to tolerate inaccurate statements for fear of silencing the speaker" because the described speech is both "more easily verifiable by its disseminator" and "less likely to be chilled by proper regulation." (*Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. at p. 772, fn. 24; accord, *Lorillard Tobacco Co. v. Reilly, supra,* 533 U.S. at p. __ [121 S.Ct. at p. 2433].)

Our dissenting colleagues are correct that the identity of the speaker is usually not a proper consideration in regulating speech that is entitled to First Amendment protection, and that a valid regulation of protected speech may not handicap one side of a public debate. But to decide whether a law regulating speech violates the First Amendment, the very first question is whether the speech that the law regulates is entitled to First Amendment protection at all. As we have seen, commercial speech that is false or misleading receives no protection under the First Amendment, and therefore a law that prohibits only such unprotected speech cannot violate constitutional free speech provisions.

We conclude, accordingly, that here the trial court and the Court of Appeal erred in characterizing as noncommercial speech, under the First Amendment to the federal Constitution, Nike's allegedly false and misleading statements about labor practices and working conditions in factories where Nike products are made.

We now disapprove as ill-considered dicta two statements of this court in *Spiritual Psychic Science Church v. City of Azusa* (1985) 39 Cal.3d 501. There we remarked that commercial speech is speech "which has but one purpose—to advance an economic transaction," and we suggested that "an advertisement informing the public that the cherries for sale at store X were picked by union workers" would be noncommercial speech. (*Id.* at p. 511.)

As we have explained, the United States Supreme Court has indicated that economic motivation is relevant but not conclusive and perhaps not even necessary. (*Bolger, supra,* 463 U.S. at p. 67 & fn. 14.) The high court has never held that commercial speech must have as its *only* purpose the advancement of an economic transaction, and it has explained instead that commercial speech may be intermingled with noncommercial speech. (*Id.* at pp. 67-68.) An advertisement primarily intended to reach consumers and to influence them to buy the speaker's products is not exempt from the category of commercial speech because the speaker also has a secondary purpose to influence lenders, investors, or lawmakers.

Nor is speech exempt from the category of commercial speech because it relates to the speaker's labor practices rather than to the price, availability, or quality of the speaker's goods. An advertisement to the public that cherries were picked by union workers is commercial speech if the speaker has a financial or commercial interest in the sale of the cherries and if the information that the cherries had been picked by union workers is likely to influence consumers to buy the speaker's cherries. Speech is commercial in its content if it is likely to influence consumers in their commercial decisions. For a significant segment of the buying public, labor practices do matter in making consumer choices.

B. The California Constitution

In the few cases in which this court has addressed the distinction between commercial and noncommercial speech, we have not articulated a separate test for determining what constitutes commercial speech under the state Constitution, but instead we have used the tests fashioned by the United States Supreme Court. For example, in *Leoni, supra,* 39 Cal.3d 609, we used the three-factor test the high court had articulated in *Bolger, supra,* 463 U.S. 60, and we concluded that the speech in question was commercial speech because two of the three factors were present. So also here, we perceive no need to articulate a separate test for commercial speech under the state Constitution. Having concluded that the speech at issue is commercial speech under the federal Constitution, we now reach the same conclusion under the California Constitution.

V. CONCLUSION

As the United States Supreme Court has explained, false and misleading speech has no constitutional value in itself and is protected only in circumstances and to the extent necessary to give breathing room for the free debate of public issues. Commercial speech, because it is both more readily verifiable by its speaker and more hardy than noncommercial speech, can be effectively regulated to suppress false and actually or inherently misleading messages without undue risk of chilling public debate. With these basic principles in mind, we conclude that when a corporation, to maintain and increase its sales and profits, makes public statements defending labor practices and working conditions at factories where its products are made, those public statements are commercial speech that may be regulated to prevent consumer deception.

Sprinkled with references to a series of children's books about wizardry and sorcery, Justice Brown's dissent itself tries to find the magic formula or incantation that will transform a business enterprise's factual representations in defense of its own products and profits into noncommercial speech exempt from our state's consumer protection laws. As we have explained, however, such representations, when aimed at potential

buyers for the purpose of maintaining sales and profits, may be regulated to eliminate false and misleading statements because they are readily verifiable by the speaker and because regulation is unlikely to deter truthful and nonmisleading speech.

In concluding, contrary to the Court of Appeal, that Nike's speech at issue here is commercial speech, we do not decide whether that speech was, as plaintiff has alleged, false or misleading, nor do we decide whether plaintiff's complaint is vulnerable to demurrer for reasons not considered here. Because the demurrers of Nike and the individual defendants were based on multiple grounds, further proceedings on the demurrers may be required in the Court of Appeal, the superior court, or both. Our decision on the narrow issue before us on review does not foreclose those proceedings.

The judgment of the Court of Appeal is reversed, and the matter is remanded to that court for further proceedings consistent with this opinion.

KENNARD, J.

WE CONCUR
GEORGE, C.J.
WERDEGAR, J.
MORENO, J.

DISSENTING OPINION BY CHIN, J.

I respectfully dissent.

Nike, Inc. (Nike), is a major international corporation with a multibillion dollar enterprise. The nature of its labor practices has become a subject of considerable public interest and scrutiny. Various persons and organizations have accused Nike of engaging in despicable practices, which they have described sometimes with such caustic and scathing words as "slavery" and "sweatshop." Nike's critics and these accusations receive full First Amendment protection. And well they should. "The First and Fourteenth Amendments embody our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . .' " (*Garrison v. Louisiana* (1964) 379 U.S. 64, 75 (*Garrison*), quoting *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 270.) "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 339-340, fn. omitted.)

While Nike's critics have taken full advantage of their right to " 'uninhibited, robust, and wide-open' " debate (*Garrison*, *supra*, 379 U.S. at p. 75), the same cannot be said of Nike, the object of their ire. When Nike tries to defend itself from these attacks, the majority denies it the same First Amendment protection Nike's critics enjoy. Why is this, according to the majority? Because Nike competes not only in the marketplace of ideas, but also in the marketplace of manufactured goods. And because Nike sells shoes—and its defense against critics may help sell those shoes—the majority asserts that Nike may not freely engage in the debate, but must run the risk of lawsuits under California's unfair competition law (Bus. & Prof. Code, § 17200 et seq.) and false advertising law (Bus. & Prof. Code, § 17500 et seq.), should it ever make a factual claim that turns out to be inaccurate. According to the majority, if Nike utters a factual misstatement, unlike its critics, it may be sued for restitution, civil penalties, and injunctive relief under these sweeping statutes. (Maj. opn., *ante*, at pp. 6-8.)

Handicapping one side in this important worldwide debate is both ill considered and unconstitutional. Full free speech protection for one side and strict liability for the other will hardly promote vigorous and meaningful debate. "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth." (*Garrison*, *supra*, 379 U.S. at p. 73.) The state, "even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and ro-

bust debate cannot thrive if directed by the government." (*Riley v. National Federation of Blind* (1988) 487 U.S. 781, 791 (*Riley*).)

In its pursuit to regulate Nike's speech—in hope of prohibiting false and misleading statements—the majority has unduly trammeled basic constitutional freedoms that form the foundation of this free government.[1] "[W]here ... suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended." (*First National Bank of Boston v. Bellotti* (1978) 435 U.S. 765, 785-786 (*Bellotti*), fn. omitted.)

I. IRRESPECTIVE OF NIKE'S ECONOMIC MOTIVATION, THE PUBLIC HAS A RIGHT TO RECEIVE INFORMATION ON MATTERS OF PUBLIC CONCERN

The United States Supreme Court has emphasized that economic motivation—in this case, Nike's desire to sell athletic products—is not a dispositive factor in determining whether certain speech is commercial. (*Bolger v. Youngs Drug Products Corp.* (1983) 463 U.S. 60, 67 (*Bolger*).) In deciding the scope of the constitutional protection of corporate speech, the high court struck down a Massachusetts criminal statute that proscribed corporations from giving campaign contributions to influence the vote on a referendum materially affecting the corporation's property, business, or assets. (*Bellotti, supra,* 435 U.S. 765.) Corporate speech, the high court noted, did not deserve less protection simply because of its source. "The question in this case, simply put, is whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection." (*Id.* at p. 778.) In Nike's case, based on the majority's holding, it does.

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[1] I take no sides in this public debate. Who is right and who is wrong is not for me, or the majority, to decide. It is for the public—fully informed as the First Amendment guarantees—to judge. (*Gertz v. Robert Welch, Inc., supra,* 418 U.S. at pp. 339-340.)

As the Court of Appeal below noted, given Nike's powerful corporate image and industry stronghold, the private company "exemplifi[ed] the perceived evils or benefits of labor practices associated with the processes of economic globalization." Nike, in effect, became the "poster child" in the international campaign for labor rights and reform (see, e.g., Note, *Now Playing: Corporate Codes of Conduct in the Global Theater: Is Nike Just Doing It?* (1998) 15 Ariz. J. Intl. & Comp. L. 905), and Nike's labor practices became relevant in a much broader and public context. Though expressions on labor disputes have been afforded full First Amendment protection (see *Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S. 748, 762 (*Va. Pharmacy Bd.*), and cited cases; *Thornhill v. Alabama* (1940) 310 U.S. 88, 101-103 (*Thornhill*)), the majority loses sight of the full protections afforded this speech in the face of Nike's corporate identity. (*Bellotti, supra,* 435 U.S. at p. 778.) And because of this myopia, the public loses.

The public at large, in addition to Nike's actual and intended customers, has the right to receive information from both sides of this international debate. "Freedom of speech presupposes a willing speaker. But where a speaker exists ... the protection afforded is to the communication, to its source and to its recipients both." (*Va. Pharmacy Bd., supra,* 425 U.S. at p. 756, fn. omitted.) The First Amendment serves an "informational purpose" that guarantees "the public access to discussion, debate, and the dissemination of information and ideas." (*Bellotti, supra,* 435 U.S. at p. 782, fn. 18; *id.* at p. 783; see *Bigelow v. Virginia* (1975) 421 U.S. 809, 822 (*Bigelow*).) Thus, not only Nike, but all of us, are the poorer for the majority's assault on free speech.

In striking down Virginia's attempt to ban a newspaper advertisement announcing the availability of legal New York abortions, the high court noted: "The advertisement ... did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.' Portions of its message ... involve the exercise of the freedom of communicating information and disseminating opinion. [¶] Viewed in its entirety, the advertisement conveyed information of potential interest and

value to a diverse audience—*not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia.* . . . Thus, in this case, appellant's First Amendment interests coincided with the constitutional interests of the general public." (*Bigelow*, *supra*, 421 U.S. at p. 822, fn. omitted, italics added; *Jacoby v. State Bar* (1977) 19 Cal.3d 359, 370-371 [following *Bigelow*]; cf. *Bolger*, *supra*, 463 U.S. at p. 68 [company may not "immunize false or misleading product information from government regulation simply by including references to public issues"].)

Here, Nike's statements regarding its labor practices in China, Thailand, and Indonesia provided vital information on the very public controversy concerning using low-cost foreign labor to manufacture goods sold in America. Nike's responses defended against adverse reports that its overseas manufacturers committed widespread labor, health, and safety law violations. Far from promoting the sale of its athletic products, Nike did not include this information through product labels, inserts, packaging, or commercial advertising intended to reach only Nike's actual or potential customers. Rather, Nike responded to the negative publicity through press releases, letters to newspapers, and letters to university presidents and athletic directors. (Cf. *Bolger*, *supra*, 463 U.S. 60 [contraceptive manufacturer's informational pamphlets included with advertisements deemed commercial speech].) To the extent Nike may have been financially motivated to defend its business and livelihood against these attacks, this motivation is not dispositive in identifying speech as commercial. (*Bolger*, *supra*, 463 U.S. at p. 67.) "Viewed in its entirety, [Nike's speech] conveyed information of potential interest and value to a diverse audience . . . ." (*Bigelow*, *supra*, 421 U.S. at p. 822.)

II. NIKE'S SPEECH IS NOT TRADITIONAL COMMERCIAL SPEECH

Indeed, characterizing Nike's speech here as commercial speech is inconsistent with the high court's constitutional jurisprudence for yet another reason.[2] The high court has stated that traditional commercial speech is speech that " 'does "no more than propose a commercial transaction." ' " (*Va. Pharmacy Bd.*, *supra*, 425 U.S. at p. 762; *Bolger*, *supra*, 463 U.S. at p. 66; see also *Board of Trustees, State Univ. of N. Y. v. Fox* (1989) 492 U.S. 469, 473; *Zauderer v. Office of Disciplinary Counsel* (1985) 471 U.S. 626, 637; but see *Central Hudson Gas & Elec. v. Public Serv. Comm'n, supra,* 447 U.S. at p. 561 [commercial speech is "expression related solely to the economic interests of the speaker and its audience"].) In this case, Nike's speech here went beyond proposing a commercial transaction. It provided information vital to the public debate on international labor rights and reform. As the Court of Appeal below observed, "[i]nformation about the labor practices at Nike's overseas plants . . . constitute[d] data relevant to a controversy of great public interest in our times."

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[2] While the majority correctly observes that in this constitutional analysis, "the very first question is whether the speech that the law regulates is entitled to First Amendment protection at all" (maj. opn., *ante*, at p. 31), it conflates this question with the issue whether commercial speech may be regulated, the latter a foregone conclusion. (*Bolger*, *supra*, 463 U.S. at p. 65.) Advocating what it calls a "limited-purpose" definition of commercial speech (maj. opn., *ante*, at pp. 20, 29), the majority proposes that a company's factual statements about its products or services are commercial and subject to regulation if these statements are "false or misleading." (*Id.* at p. 31.) In other words, the majority concludes "a law that prohibits only such unprotected speech cannot violate constitutional free speech provisions." (*Ibid.*) Whether a company's statements are allegedly false or misleading does not determine the threshold question at issue in this case—whether the speech is commercial or noncommercial. (See *Central Hudson Gas & Elec. v. Public Serv. Comm'n* (1980) 447 U.S. 557, 566.)

Contrary to the majority's assertions (see maj. opn., *ante*, at p. 29), the high court's restriction—" 'advertising which "links a product to a current public debate" is not thereby entitled to the constitutional protection afforded noncommercial speech' " (*Bolger*, *supra*, 463 U.S. at p. 68)—does not apply here. In *Bolger*, the informational mailings, though containing issues of public concern such as venereal disease and family planning, were at bottom commercial speech directed at selling contraceptives. (*Id.* at p. 66.) The court made clear that most of the mailings fell "within the core notion of commercial speech—'speech which does "no more than propose a commercial transaction." ' " (*Ibid.*) To the extent that some mailings discussed public concerns, the high court cautioned that "[a]dvertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." (*Id.* at p. 68.)

In a case decided before *Bolger*, the high court held that a utility company's monthly electric bill inserts advocating the use of nuclear power, could not be regulated under the First and Fourteenth Amendments. (*Consolidated Edison Co. v. Public Serv. Comm'n* (1980) 447 U.S. 530 (*Consolidated Edison*).) In *Consolidated Edison*, the high court did not address whether the inserts constituted commercial speech. Rather, it concluded that the utility commission's regulation banning the inserts "limited the means by which Consolidated Edison may participate in the public debate on this question and other controversial issues of national interest and importance. Thus, the Commission's prohibition of discussion of controversial issues strikes at the heart of the freedom to speak." (*Id.* at p. 535.) Despite Consolidated Edison's obvious economic incentive in promoting the use of nuclear power, the high court did not consider, must less determine, whether the inserts placed in electric bills amounted to commercial speech.

The high court's concern in *Bolger*, *supra*, 463 U.S. 60, therefore, was that advertisers refrain from inserting information on public issues *as a pretext* to avoid regulations governing their

commercial speech.[3] That is simply not the case here. Nike's speech—in the form of press releases and letters defending against accusations about its overseas labor practices—was not in any sense pretextual, but prompted and necessitated by public criticism. As noted, Nike did not use product labels, packaging, advertising, or other media intended to directly reach its actual or potential customers. Nike's speech did not "simply . . . include[] references to public issues." (*Bolger*, *supra*, 463 U.S. at p. 68.) Nike's labor practices and policies, and in turn, its products, *were* the public issue. Its "discussion of controversial issues strikes at the heart of the freedom to speak." (*Consolidated Edison*, *supra*, 447 U.S. at p. 535.)

At the very least, this case typifies the circumstance where commercial speech and noncommercial speech are "inextricably intertwined." (*Riley*, *supra*, 487 U.S. at p. 796.) In *Riley*, the high court held that a North Carolina statute regulating solicitation of charitable contributions affected protected speech and was not narrowly tailored to meet the state's interest in protecting charities from fraud. (*Id.* at p. 789.) As relevant here, the court observed that even if a professional fundraiser's speech amounted to commercial speech, "we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech." (*Id.* at p. 796.) It further held that "where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial

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[3] The phrase " 'does "no more than propose a commercial transaction" ' " (*Bolger*, *supra*, 463 U.S. at p. 66) "must be understood to reflect judgments about 'the character of the expressive activity' at issue judgments that necessarily entail an assessment of the nature and constitutional significance of the larger social practice within which that activity is embedded. That is why commercial speech cannot be transformed into public discourse merely by altering its content to insert assertions about matters of public concern." (Post, *The Constitutional Status of Commercial Speech* (2000) 48 U.C.L.A. L.Rev. 1, 18-19, fns. omitted.)

and impractical. Therefore, we apply our test for fully protected expression." (*Ibid.*)

Notwithstanding the fact that *Riley* dealt with charitable solicitations, which are not involved in this case, the high court relied, in part, on a case that provides insight here. (*Riley*, *supra*, 487 U.S. at p. 796, citing *Thomas v. Collins* (1945) 323 U.S. 516, 540-541 (*Thomas*).) In *Thomas*, which did not deal with solicitation of property or funds, the high court addressed the issue whether a union organizer's speech soliciting members was protected by the First Amendment, and whether a registration requirement in order to speak was constitutionally impermissible. (*Thomas*, *supra*, 323 U.S. at pp. 533-534.) Answering *yes* to both questions, the high court cautioned that a state's regulation, "whether aimed at fraud or other abuses, must not trespass upon the domain set apart for free speech and free assembly. This Court has recognized that 'in the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. . . . Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.' " (*Id.* at p. 532, quoting *Thornhill*, *supra*, 310 U.S. at pp. 102, 103.)[4]

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[4] Contrary to the majority's suggestion (maj. opn., *ante*, at p. 27), the fact that the high court decided both *Thornhill*, *supra*, 310 U.S. 88, and *Thomas*, *supra*, 323 U.S. 516, before its seminal cases on commercial speech, does not make these earlier cases' affirmation of fundamental principles on First Amendment protection less pertinent. Indeed, the high court relied, in part, on *Thornhill*, *supra*, 310 U.S. at page 102, in *Va. Pharmacy Bd.*, *supra*, 425 U.S. at page 762, to conclude that "[t]he interests of the contestants in a labor dispute are primarily economic, but it has long been settled that both the employee and the employer are protected by the First Amendment when they express themselves on the merits of the dispute in order to influence its outcome."

This case resembles *Thomas* in that Nike's speech provided information " 'concerning the conditions in [the manufacturing] industry' " and thereby used " 'the processes of popular government to shape the destiny of modern industrial society.' [Citation.]" (*Thomas*, *supra*, 323 U.S. at p. 532, quoting *Thornhill*, *supra*, 310 U.S. at p. 102.) Nike, which came to the forefront of the international labor abuse debate, provided relevant information about its labor practices in its overseas plants. Nike's speech, in an attempt to influence public opinion on economic globalization and international labor rights and working conditions, gave the public insight and perspective into the debate. This speech should be fully protected as "essential to free government." (*Thornhill*, *supra*, 310 U.S. at p. 95.)

The majority's attempt to parse out Nike's noncommercial speech—"*to the extent* Nike's speech represents expression of opinion or points of view on general policy questions . . . it is noncommercial speech" (maj. opn., *ante*, at p. 30, italics added)—is both unavailing and unhelpful. Even assuming that Nike's factual statements regarding how its products are made constitute commercial speech, that speech is "inextricably intertwined" with its noncommercial speech. (*Riley*, *supra*, 487 U.S. at p. 796.) Contrary to the majority's suggestion (maj. opn., *ante*, at pp. 29-30), Nike realistically could not discuss its general policy on employee rights and working conditions and its views on economic globalization *without* reference to the labor practices of its overseas manufacturers, Nike products, and how they are made. Attempting to parse out the commercial speech from the noncommercial speech in this context "would be both artificial and impractical." (*Riley*, *supra*, 487 U.S. at p. 796)

III. CONCLUSION

The majority today refuses to honor a fundamental commitment and guarantee that both sides in a public debate may compete vigorously—and equally—in the marketplace of ideas. The First Amendment ensures the freedom to speak on matters of public interest by *both* sides, not just one judicially favored. (*Bellotti*, *supra*, 435 U.S. at pp. 785-786.) Sadly, Nike is not the only one who loses here—the public does, too. "Those who won our independence had confidence in the power of free and

fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion." (*Thornhill*, *supra*, 310 U.S. at p. 95.)

Because I would give *both* sides in this important public controversy the full protection that our Constitution guarantees, I respectfully dissent.

CHIN, J.

I CONCUR:

BAXTER, J.

DISSENTING OPINION BY BROWN, J.

I respectfully dissent.

I

In 1942, the United States Supreme Court, like a wizard trained at Hogwarts, waved its wand and "plucked the commercial doctrine out of thin air." (Kozinski & Banner, *Who's Afraid of Commercial Speech* (1990) 76 Va. L.Rev. 627, 627.) Unfortunately, the court's doctrinal wizardry has created considerable confusion over the past 60 years as it has struggled to define the difference between commercial and noncommercial speech. The United States Supreme Court has, in recent years, acknowledged "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category." (*City of Cincinnati v. Discovery Network, Inc.* (1993) 507 U.S. 410, 419 (*Discovery Network*).) After tracing the various definitions of commercial speech used over the years, the court conceded that no "categorical definition of the difference between" commercial and noncommercial speech exists. (*Id.* at pp. 420-423.) Instead, the difference is a matter of " 'common[]sense' " (*Ohralik v. Ohio State Bar Assn.* (1978) 436 U.S. 447, 455-456 (*Ohralik*)), and restrictions on speech "must be examined carefully to ensure that speech deserving of greater constitutional protection is not

inadvertently suppressed." (*Bolger v. Youngs Drug Products Corp.* (1983) 463 U.S. 60, 66, fn. omitted (*Bolger*).) Consistent with these pronouncements, the United States Supreme Court has expressly refused to define the elements of commercial speech. (See *id.* at p. 67, fn. 14.) Indeed, "the impossibility of specifying the parameters that define the category of commercial speech has haunted its jurisprudence and scholarship." (Post, *The Constitutional Status of Commercial Speech* (2000) 48 UCLA L.Rev. 1, 7.)

Despite this chaos, the majority, ostensibly guided by *Bolger*, has apparently divined a new and simpler test for commercial speech. Under this "limited-purpose test," "categorizing a particular statement as commercial or noncommercial speech requires consideration of three elements: the speaker, the intended audience, and the content of the message." (Maj. opn., *ante*, at p. 20.) Unfortunately, the majority has forgotten the teachings of H.L. Mencken: "every human problem" has a "solution" that is "neat, plausible, and wrong." (Mencken, *Prejudices: Second Series* (1977 reprint) p. 148.) Like the purported discovery of cold fusion over a decade ago, the majority's test for commercial speech promises much, but solves nothing. Instead of clarifying the commercial speech doctrine, the test violates fundamental principles of First Amendment jurisprudence by making the level of protection given speech dependent on the identity of the speaker—and not just the speech's content—and by stifling the ability of certain speakers to participate in the public debate. In doing so, the majority unconstitutionally favors some speakers over others and conflicts with the decisions of other courts.

Contrary to the majority's belief, our current First Amendment jurisprudence defies any simple solution. Under the commercial speech doctrine currently propounded by the United States Supreme Court, all speech is *either* commercial or noncommercial, and commercial speech receives less protection than noncommercial speech. (*Central Hudson Gas & Ele. Corp. v. Public Serv. Comm'n* (1980) 447 U.S. 557, 562-563 (*Central Hudson*).) The doctrine further assumes that all commercial speech is the *same* under the First Amendment. Thus, all com-

mercial speech receives the *same* level of lesser protection. The state may therefore ban *all* commercial speech "that is fraudulent or deceptive without further justification" (*Edenfield v. Fane* (1993) 507 U.S. 761, 768), but may not do the same to fraudulent or deceptive speech in " 'matters of public concern' " (*Dun & Bradstreet, Inc. v. Greenmoss Builders* (1985) 472 U.S. 749, 758-759 (plur. opn. of Powell, J.) (*Dun & Bradstreet*), quoting *First National Bank of Boston v. Bellotti* (1978) 435 U.S. 765, 776 (*Bellotti*)).

This simple categorization presupposes that commercial speech is wholly distinct from noncommercial speech and that all commercial speech has the same value under the First Amendment. The reality, however, is quite different. With the growth of commercialism, the politicization of commercial interests, and the increasing sophistication of commercial advertising over the past century, the gap between commercial and noncommercial speech is rapidly shrinking. As several commentators have observed, examples of the intersection between commercial speech and various forms of noncommercial speech, including scientific, political and religious speech, abound. (See, e.g., Kozinski & Banner, *Who's Afraid of Commercial Speech*, *supra*, 76 Va. L.Rev. at pp. 639-648; Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech* (1990) 43 Vand. L.Rev. 1433, 1449-1454.) Indeed, the recent commissioning of a Fay Weldon novel by the jewelry company Bulgari as a marketing ploy highlights this blurring of commercial and noncommercial speech. (See Arnold, *Making Books: Placed Products, and Their Cost*, N.Y. Times (Sept. 13, 2001) p. E3, col. 1.)

Although the world has become increasingly commercial, the dichotomous nature of the commercial speech doctrine remains unchanged. The classification of speech as commercial or noncommercial determines the level of protection accorded to that speech under the First Amendment. Thus, the majority correctly characterizes the issue as "whether defendant corporation's false statements are commercial or noncommercial speech for purposes of constitutional free speech analysis under the state and federal Constitutions." (Maj. opn., *ante*, at p. 1.) If

Nike's press releases, letters and other documents are commercial speech, then the application of Business and Professions Code sections 17204 and 17535[1]—which establish strict liability for false and misleading ads—is constitutional. Otherwise, it is not.

Constrained by this rigid dichotomy, I dissent because Nike's statements are more like noncommercial speech than commercial speech. Nike's commercial statements about its labor practices cannot be separated from its noncommercial statements about a public issue, because its labor practices *are* the public issue. Indeed, under the circumstances presented in this case, Nike could hardly engage in a general discussion on overseas labor exploitation and economic globalization without discussing its own labor practices. (See *Thomas v. Collins* (1945) 323 U.S. 516, 534-535.) Thus, the commercial elements of Nike's statements are "inextricably intertwined" with their noncommercial elements. (*Riley v. National Federation of Blind* (1988) 487 U.S. 781, 796 (*Riley*).) This court should therefore "apply [the] test for fully protected expression," notwithstanding the majority's specious distinctions of the relevant case law. Under this test, a categorical ban on all false and misleading statements made by Nike about its labor practices violates the First Amendment.

Although this result follows from controlling United States Supreme Court precedent, I believe the commercial speech doctrine, in its current form, fails to account for the realities of the modern world—a world in which personal, political, and commercial arenas no longer have sharply defined boundaries. My sentiments are not unique; many judges and academics have echoed them. (See, e.g., Kozinski & Banner, *The Anti-History and Pre-History of Commercial Speech* (1993) 71 Tex. L.Rev. 747; Kozinski & Banner, *Who's Afraid of Commercial Speech*, *supra*, 76 Va. L.Rev. at p. 627; Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free*

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[1] All further statutory references are to the Business and Professions Code.

Expression (1971) 39 Geo. Wash. L.Rev. 429.) Even some justices on the high court have recently questioned the validity of the distinction between commercial and noncommercial speech. (See *44 Liquormart, Inc. v. Rhode Island* (1996) 517 U.S. 484, 522 (conc. opn. of Thomas, J.) ["I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech"]; *id.* at p. 517 (conc. opn. of Scalia, J.) ["I share Justice Thomas's discomfort with the *Central Hudson* test"].) Nonetheless, the high court has apparently declined to abandon it. (See, e.g., *Greater New Orleans Broadcasting Assn., Inc. v. United States* (1999) 527 U.S. 173, 183 (*Greater New Orleans Broadcasting*) [applying the *Central Hudson* test to restrictions on commercial speech].) Given that the United States Supreme Court is not prepared to start over, we must try to make the commercial speech doctrine work—warts and all. To this end, I believe the high court needs to develop a more nuanced approach that maximizes the ability of businesses to participate in the public debate while minimizing consumer fraud.

II

According to the majority, all speech containing the following three elements is commercial speech: (1) "a commercial speaker" (maj. opn., *ante*, at p. 24); (2) "an intended commercial audience" (*ibid.*); and (3) "representations of fact of a commercial nature" (*ibid.*). The first element is satisfied whenever the speaker is engaged in "the production, distribution, or sale of goods or services" "or someone acting on behalf of a person so engaged." (*Id.* at p. 20.) The second element is satisfied whenever the intended audience is "actual or potential buyers or customers of the speaker's goods or services, or persons acting for actual or potential buyers or customers, or persons (such as reporters or reviewers) likely to repeat the message to or otherwise influence actual or potential buyers or customers." (*Ibid.*) The third element is satisfied whenever "the speech consists of representations of fact about the business operations, products, or services of the speaker (or the individual or company that the speaker represents), made for the purpose of promoting sales of,

or other commercial transactions in, the speaker's products or services." (*Id.* at p. 21.)

Although the majority constructed this limited-purpose test from its "close reading of the high court's commercial speech decisions" (maj. opn., *ante*, at p. 20), it conveniently dismisses those decisions that cast doubt on its formulation. As explained below, a closer review of the relevant case law reveals that the majority's test for commercial speech contravenes long-standing principles of First Amendment law.

First, the test flouts the very essence of the distinction between commercial and noncommercial speech identified by the United States Supreme Court. "If commercial speech is to be distinguished, it 'must be distinguished *by its content.*' " (*Bates v. State Bar of Ariz.* (1977) 433 U.S. 350, 363, italics added (*Bates*), quoting *Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S. 748, 761 (*Va. Consumer Council*).) Despite this caveat, the majority distinguishes commercial from noncommercial speech using two criteria wholly unrelated to the speech's content: the identity of the speaker and the intended audience. (See maj. opn., *ante*, at p. 20.) In doing so, the majority strays from the guiding principles espoused by the United States Supreme Court.

Second, the test contravenes a fundamental tenet of First Amendment jurisprudence by making the identity of the speaker potentially dispositive. As the United States Supreme Court stated long ago, "[the] identity of the speaker is not decisive in determining whether speech is protected" (*Pacific Gas & Electric Co. v. Public Utilities Comm'n* (1986) 475 U.S. 1, 8 (plur. opn. of Powell, J.) (*Pacific Gas & Electric*)), and "speech does not lose its protection because of the corporate identity of the speaker" (*id.* at p. 16). This is because corporations and other speakers engaged in commerce "contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster." (*Id.* at p. 8, quoting *Bellotti*, *supra*, 435 U.S. at p. 783.) Thus, "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon *the identity of its source*, whether corporation, association, union, or individual." (*Bellotti*, at p. 777, italics

added.) Despite these admonitions, the majority has made the identity of the speaker a significant, and potentially dispositive, factor in determining the scope of protection accorded to speech under the First Amendment. (See maj. opn., *ante*, at p. 20.) As a result, speech by "someone engaged in commerce" may receive less protection solely because of the speaker's identity. (*Ibid.*) Indeed, the majority's limited-purpose test makes the identity of the speaker dispositive whenever the speech at issue relates to the speaker's business operations, products, or services, in contravention of United States Supreme Court precedent. (See *Pacific Gas & Electric*, *supra*, 475 U.S. at p. 8 (plur. opn. of Powell, J.).)

Third, the test violates the First Amendment by stifling the ability of speakers engaged in commerce, such as corporations, to participate in debates over public issues. The United States Supreme Court has broadly defined public issues as those issues "about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." (*Thornhill v. Alabama* (1940) 310 U.S. 88, 102.) "The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled . . . ." (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 269 (*New York Times*).) "[S]peech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection" (*Connick v. Myers* (1983) 461 U.S. 138, 145), because such speech "is more than self-expression; it is the essence of self-government" (*Garrison v. Louisiana* (1964) 379 U.S. 64, 74-75). "The First and Fourteenth Amendments remove 'governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity . . . .' " (*Consolidated Edison Co. v. Public Serv. Comm'n of New York* (1980) 447 U.S. 530, 534 (*Consolidated Edison*), quoting *Cohen v. California* (1971) 403 U.S. 15, 24.) Thus, the First Amendment "both fully protects and implicitly encourages" public debate on " 'matters of public concern.' " (*Pacific Gas & Electric*, *supra*, 475 U.S. at p. 9 (plur. opn. of

Powell, J.), quoting *Thornill v. Alabama*, *supra*, 310 U.S. . 101.)

To ensure "uninhibited, robust, and wide-open" "deba on public issues" (*New York Times*, *supra*, 376 U.S. at p. 270), the United States Supreme Court has recognized that some false o misleading speech must be tolerated. Although "[u]ntruthfu speech, commercial or otherwise, has never been protected fo its own sake" (*Va. Consumer Council*, *supra*, 425 U.S. at p. 771), "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters" (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 341 (*Gertz*)). The "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive' . . . ." (*New York Times*, *supra*, 376 U.S. at pp. 271-272, quoting *N.A.A.C.P. v. Button* (1963) 371 U.S. 415, 433.) Because "a rule that would impose strict liability on a" speaker "for false factual assertions" in a matter of public concern "would have an undoubted 'chilling' effect" on speech "that does have constitutional value" (*Hustler Magazine v. Falwell* (1988) 485 U.S. 46, 52), "only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions" (*Garrison v. Louisiana*, *supra*, 379 U.S. at p. 74).

The majority contends its limited-purpose test for commercial speech does not violate these principles because false or misleading commercial speech may be prohibited "entirely." (Maj. opn., *ante*, at p. 12.) This logic is, however, faulty, because it erroneously assumes that false or misleading commercial speech as defined by the majority can never be speech about a public issue. Under the majority's test, the content of commercial speech is limited only to representations regarding "business operations, products, or services." (Maj. opn., *ante*, at p. 21.) But business operations, products, or services may be public issues. For example, a corporation's business operations may be the subject of public debate in the media. These operations may even be a political issue as organizations, such as state, local, or student governments, propose and pass resolu-

tions condemning certain business practices. Under these circumstances, the corporation's business operations undoubtedly become a matter of public concern, and speech about these operations merits the full protection of the First Amendment. (See *Thornhill v. Alabama*, *supra*, 310 U.S. at p. 102.) Indeed, the United States Supreme Court has long recognized that speech on a public issue may be inseparable from speech promoting the speaker's business operations, products or services. (See *Thomas v. Collins*, *supra*, 323 U.S. at pp. 535-536 [recognizing that a union representative could not discuss the benefits of unionism without hawking the union's services].)

The majority, however, creates an overbroad test that, taken to its logical conclusion, renders all corporate speech commercial speech. As defined, the test makes any public representation of fact by a speaker engaged in commerce about that speaker's products made for the purpose of promoting that speaker's products commercial speech. (See maj. opn., *ante*, at pp. 20-26.) A corporation's product, however, includes the corporation itself. Corporations are regularly bought and sold, and corporations market not only their products and services but also themselves. Indeed, business goodwill is an important asset of every corporation and contributes significantly to the sale value of the corporation. Because all corporate speech about a public issue reflects on the corporate image and therefore affects the corporation's business goodwill and sale value, the majority's test makes all such speech commercial notwithstanding the majority's assertions to the contrary. (See maj. opn., *ante*, at pp. 28-29.)

In so doing, the majority violates a basic principle of First Amendment law. (*Consolidated Edison*, *supra*, 447 U.S. at p. 535 [restrictions on the means by which a corporation "may participate in the public debate" "strike[] at the heart of the freedom to speak"].) By subjecting all corporate speech about business operations, products and services to the strict liability provisions of sections 17204 and 17535, the majority's limited-purpose test unconstitutionally chills a corporation's ability to participate in the debate over matters of public concern. (See *Garrison v. Louisiana*, *supra*, 379 U.S. at p. 74.) The chilling effect is exacerbated by the breadth of sections 17204 and 17535, which "prohibit 'not only advertising which is false, but also advertising which[,] although true, is either actually misleading or *which has a capacity, likelihood or tendency to deceive or confuse the public.*' " (Maj. opn., *ante*, at p. 8, italics added, quoting *Leoni v. State Bar* (1985) 39 Cal.3d 609, 626 (*Leoni*).) This broad definition of actionable speech puts a corporation "at the mercy of the varied understanding of [its] hearers and consequently of whatever inference may be drawn as to [its] intent and meaning." (*Thomas v. Collins*, *supra*, 323 U.S. at p. 535.) Because the corporation could never be sure whether its truthful statements may deceive or confuse the public and would likely incur significant burden and expense in litigating the issue, "[m]uch valuable information which a corporation might be able to provide would remain unpublished . . . ." (*Bellotti*, *supra*, 435 U.S. at p. 785, fn. 21.) As the United States Supreme Court has consistently held, such a result violates the First Amendment! (*Ibid.*)

Finally, in singling out speakers engaged in commerce and restricting their ability to participate in the public debate, the majority unconstitutionally favors certain speakers over others. Corporations "have the right to be free from government restrictions that abridge [their] own rights in order to 'enhance the relative voice' of [their] opponents." (*Pacific Gas & Electric*, *supra*, 475 U.S. at p. 14 (plur. opn. of Powell, J.), quoting *Buckley v. Valeo* (1976) 424 U.S. 1, 49 & fn. 55.) The First Amendment does not permit favoritism toward certain speakers "based on the identity of the interests that [the speaker] may represent." (*Bellotti*, *supra*, 435 U.S. at p. 784.) Indeed, "self-government suffers when those in power suppress competing views on public issues 'from diverse and antagonistic sources.' " (*Id.* at p. 777, fn. 12, quoting *Associated Press v. United States* (1945) 326 U.S. 1, 20.) The majority, however, does just that. Under the majority's test, only speakers engaged in commerce are strictly liable for their false or misleading representations pursuant to sections 17204 and 17535. Meanwhile, other speakers who make the same representations may face no such liability, regardless of the context of their statements. Neither United States

Supreme Court precedent nor our precedent countenances such favoritism in doling out First Amendment rights.

III

The majority's limited-purpose test is not only problematic in light of controlling high court precedent, the test appears to conflict with the analysis used by other courts in analogous contexts. These conflicts belie the majority's claim of doctrinal consistency and underscore the illusory nature of its so-called solution to the commercial speech quandary.

For example, the majority opinion conflicts with *Gordon & Breach Science Publishers v. AIP* (S.D.N.Y. 1994) 859 F.Supp. 1521 (*Gordon & Breach*). In *Gordon & Breach*, the defendant, a nonprofit publisher of scientific journals, published scientific articles touting its journals as "both less expensive and more scientifically important than those of for-profit publishers such as" the plaintiff. (*Id.* at p. 1525.) The defendant, as part of an advertising campaign designed to promote its journals, touted and defended the conclusions of these articles by, among other things, issuing press releases and writing letters to the editor responding to attacks on these articles. (*Id.* at pp. 1526-1527.) In light of these promotional activities, the plaintiff sued the defendant for false advertising under the Lanham Trademark Act (15 U.S.C. § 1125(a)) and New York law.

In determining whether the defendant's advertising campaign constituted commercial speech, the district court identified the following dilemma: how to characterize "speech which, from one perspective, presents the aspect of protected, noncommercial speech addressing a significant public issue, but which, from another perspective, appears primarily to be speech 'proposing a commercial transaction.' " (*Gordon & Breach*, *supra*, 859 F.Supp. at p. 1539.) After analyzing the relevant United States Supreme Court precedent, the court concluded that the articles, press releases and letters to the editor constituted noncommercial speech fully protected by the First Amendment.

(See *id.* at pp. 1543-1544.)[2] According to the court, this speech fell "too close to core First Amendment values to be considered 'commercial advertising or promotion' under the Lanham Act." (*Id.* at p. 1544.)

Application of the majority's test would, however, result in a different outcome. The defendant was engaged in commerce; it sold journals. The intended audience was undoubtedly potential customers. The articles, press releases and letters contained representations of fact about the defendant's products—its journals. Thus, they contain the three elements of commercial speech identified by the majority. The majority would therefore classify this speech as commercial speech even though it constitutes "fully protected commentary on an issue of public concern." (*Gordon & Breach*, *supra*, 859 F.Supp. at p. 1544.)

Similarly, the majority's test creates a conflict with *Oxycal Laboratories, Inc. v. Jeffers* (S.D.Cal. 1995) 909 F.Supp. 719. In *Oxycal*, the defendants published a book that denigrated the plaintiffs' products while promoting the defendants' products. The defendants allegedly promoted the book in an effort to boost the sales of their own products. The plaintiffs sued, alleging false advertising. (See *id.* at pp. 720-721.) Finding this case easy, the court concluded that the book was noncommercial speech because there were "sufficient noncommercial motivations" notwithstanding the commercial motivations. (*Id.* at pp. 724-725.) To the extent the book contained commercial elements promoting the defendants' products, these commercial elements were "intertwined" with and secondary to the noncommercial elements. (*Id.* at p. 725.)

Once again, the majority's test would yield a contrary result. The defendants were engaged in commerce, and the intended audience for the book was potential consumers. The book con-

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[2] The court did find that the defendant's distribution of preprints of the articles to potential customers and its repeated dissemination of the conclusions of these articles to potential customers constituted commercial speech. (*Gordon & Breach*, *supra*, 859 F.Supp. at p. 1544.)

tained representations of fact about the defendants' products, and the defendants undoubtedly made these representations for the purpose of promoting their products. Thus, under the majority's test, the book was commercial speech, and the defendants would have been strictly liable for any false or misleading statements about their products in the book.

Although we are not bound by these decisions, they are instructive and highlight the deficiencies in the majority's limited-purpose test for commercial speech. In divining a new test for commercial speech, the majority finds a deceptively simple answer to a complicated question. Unfortunately, the answer is flawed. By failing to recognize that a speaker's business operations, products, or services may be matters of public concern, the majority ignores controlling principles of First Amendment law. As a result, the majority erroneously draws a bright line when "a broader and more nuanced inquiry" is required. (*Gordon & Breach*, *supra*, 859 F.Supp. at p. 1537; see also *id.* at p. 1540, fn. 7.)

IV

Of course, my rejection of the majority's limited-purpose test does not resolve the central issue in this case: What level of protection should be accorded to Nike's speech under the First Amendment? To answer this question, this court, as the majority correctly notes, must determine whether Nike's speech is commercial or noncommercial speech. Following the existing framework set up by the United States Supreme Court, I would conclude that Nike's speech is more like noncommercial speech than commercial speech because its commercial elements are inextricably intertwined with its noncommercial elements. Thus, I would give Nike's speech the full protection of the First Amendment.

When determining whether speech is commercial or noncommercial, courts must "ensure that speech deserving of greater constitutional protection is not inadvertently suppressed." (*Bolger*, *supra*, 463 U.S. at p. 66, fn. 11.) In following this philosophy in cases involving hybrid speech containing both commercial and noncommercial elements, the United

States Supreme Court has assessed the separability of these elements to determine the proper level of protection. If the commercial elements are separable from the noncommercial elements, then the speech is commercial and receives lesser protection. Thus, advertising that merely "links a product to a current public debate" is still commercial speech notwithstanding its noncommercial elements. (*Central Hudson*, *supra*, 447 U.S. at p. 563, fn. 5.) Where the speaker may comment on a public issue without promoting its products or services, the speech is also commercial, even if the speaker combines a commercial message with a noncommercial message. (See *Board of Trustees, State Univ. of N. Y. v. Fox* (1989) 492 U.S. 469, 474 (*Fox*) [speaker did not have to combine its sales pitch for Tupperware with its home economics lessons].) Indeed, "[a]dvertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." (*Bolger*, at p. 68.)

The United States Supreme Court has, however, recognized that commercial speech may be "inextricably intertwined" with noncommercial speech in certain contexts. (*Riley*, *supra*, 487 U.S. at p. 796.) Where regulation of the commercial component of certain speech would stifle otherwise protected speech, "we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical." (*Ibid.*) In such cases, courts must apply the "test for fully protected expression" rather than the test for commercial speech.[3] (*Ibid.*)

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[3] The majority's attempts to distinguish *Riley* are not persuasive. First, "charitable solicitations" *do* "involve factual representations about a product or service that is offered for sale" (maj. opn., *ante*, at p. 29), where, as in *Riley*, the charitable solicitations are made by professional fundraisers who solicit contributions for a fee (see *Riley*, *supra*, 487 U.S. at pp. 874-785). Second, *Fox* does not preclude the application of *Riley* in this case. (See maj. opn., *ante*, at pp. 29-30.) It *is* "impossible for Nike to address" certain public issues without addressing its own labor practices (maj. opn., *ante*, at p. 30), because these practices are the public issue and symbolize the current

Although the United States Supreme Court has mostly found this intertwining of commercial and noncommercial speech in the charitable solicitation context,[4] it has also done so in a factual context analogous to the one presented here. In *Thomas v. Collins*, *supra*, 323 U.S. 516,[5] the United States Supreme Court held that a speech made by a union representative promoting the union's services and inviting workers to join constituted noncommercial speech fully protected by the First Amendment. (*Id.* at pp. 536-537.) Although the court acknowledged that the speech promoted the services of the union and sought to solicit new members, it found that these commercial elements were inextricably intertwined with the noncommercial elements addressing a public issue—unionism. (See *id.* at pp. 535-536.) "The feat would be incredible for a national leader, addressing such a meeting, lauding unions and their principles, urging adherence to union philosophy, not also and thereby to suggest at-

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debate over overseas labor exploitation and economic globalization (see, *post*, at pp. 17-20).

[4] (See, e.g., *Riley*, *supra*, 487 U.S. at p. 796; *Secretary of State of Md. v. J. H. Munson Co.* (1984) 467 U.S. 947, 959-960; *Village of Schaumburg v. Citizens for Better Environ.* (1980) 444 U.S. 620, 632; see also *Meyer v. Grant* (1988) 486 U.S. 414, 422, fn. 5 [finding the solicitation of signatures for a petition to be noncommercial speech].)

[5] The majority contends *Thomas* and *Thornhill* are not relevant because "[t]he United States Supreme Court issued these decisions three decades before it developed the modern commercial speech doctrine in *Bigelow v. Virginia* [(1975)] 421 U.S. 809, and *Va.* [*Consumer Council*], *supra*, 425 U.S. 748." (Maj. opn., *ante*, at p. 27.) The majority, however, conveniently neglects to mention that both *Bigelow* and *Va. Consumer Council* cite *Thomas* and *Thornhill* with approval. (See *Va. Consumer Council*, *supra*, 425 U.S. at pp. 758-759 [citing *Thomas* as a case where the court "has stressed that communications to which First Amendment protection was given were not 'purely commercial' "]; *id.* at pp. 757, 762; *Bigelow*, *supra*, 421 U.S. at p. 816.) Thus, the United States Supreme Court, in developing the commercial speech doctrine, did not intend to overrule or diminish the relevance of *Thomas* and *Thornhill*. In any event, the binding effect of a high court opinion does not diminish with age.

tachment to the union by becoming a member." (*Id.* at p. 535.) Indeed, "whether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation." (*Ibid.*)

Finding that the commercial elements of the union representative's speech should be accorded the full protection of the First Amendment, the court concluded that distinguishing between the speech's commercial and noncommercial elements "offers no security for free discussion." (*Thomas v. Collins*, *supra*, 323 U.S. at p. 535.) "In these conditions," making such a distinction "blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim." (*Ibid.*) "When legislation or its application can confine labor leaders on such occasions to innocuous and abstract discussion of the virtues of trade unions and so becloud even this with doubt, uncertainty and the risk of penalty, freedom of speech for them will be at an end. A restriction so destructive of the right of public discussion . . . is incompatible with the freedoms secured by the First Amendment." (*Id.* at pp. 536-537.)

This case presents a similar scenario because Nike's overseas labor practices have become a public issue. According to the complaint, Nike faced a sophisticated media campaign attacking its overseas labor practices. As a result, its labor practices were discussed on television news programs and in numerous newspapers and magazines. These discussions have even entered the political arena as various governments, government officials and organizations have proposed and passed resolutions condemning Nike's labor practices.[6] Given these facts, Nike's

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[6] (See, e.g., Cleeland, Market Savvy Students Give Sweatshop Fight the College Try, L.A. Times (Apr. 22, 1999) p. C1 ["a half-dozen universities have adopted stringent codes of conduct for manufacturers of apparel that bear their logos; many more are reexamining their policies"]; Martinez, Student Protests Unlikely to Kill UA-Nike Deal, Ariz. Daily Star (Jan. 25, 1998) p. 1B ["Hundreds of UA students have signed a petition protesting the university's impending con-

overseas labor practices were undoubtedly a matter of public concern, and its speech on this issue was therefore "entitled to special protection." (*Connick v. Myers*, *supra*, 461 U.S. at p. 145.) Because Nike could not comment on this public issue *without* discussing its overseas labor practices, the commercial elements of Nike's representations about its labor practices were inextricably intertwined with their noncommercial elements. (See *Riley*, *supra*, 487 U.S. at p. 796.) As such, these representations must be fully protected as noncommercial speech in the factual context presented here. (See *Thomas v. Collins*, *supra*, 323 U.S. at pp. 535-536.)

The majority's assertion that Nike's representations about its overseas labor practices are distinct from its comments on "policy questions" is simply wrong. (Maj. opn., *ante*, at p. 28.) The majority contends Nike can still comment on the policy issues implicated by its press releases and letters because it can generally discuss "the degree to which domestic companies should be responsible for working conditions in factories located in other countries, or what standards domestic companies ought to observe in such factories, or the merits and effects of economic 'globalization' generally . . . ." (Maj. opn, *ante*, at pp. 28-29.) The majority, however, conveniently forgets that Nike's over-

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tract with Nike because of alleged human rights abuses in the company's factories overseas"]; Stepping Up Nike Criticism, Newsday (Nov. 10, 1997) p. A22 ["More than 50 lawmakers yesterday called on Nike Inc. to improve labor standards in Third World factories and to employ more people in the United States"]; Stancill, Students to Keep Pressure on Nike, Raleigh News & Observer (Nov. 8, 1997) p. B1 [students signing and circulating petitions against Nike]; Jeffcott, Consumer Power Takes on Brand Names, Big Retailers (Sept. 7, 1997) 21 Catholic New Times 14, 15 [as part of the global movement to end sweatshops, various groups are pressuring "city councils to adopt 'no sweat resolutions' " directed at multinational companies like Nike]; Himelstein, Going Beyond City Limits?, Business Week (July 7, 1997) p. 98 [at least 10 cities have passed no-sweatshop ordinances directed at multinational companies like Nike]; Klein, Just Doing It Lands Nike in Ethical Hot Water, Toronto Star (Feb. 24, 1997) p. A19 [city council passes resolution banning the use of child-made Nike soccer balls].)

seas labor practices *are* the public issue. (See, *ante*, at pp. 17-18.) Thus, general statements about overseas labor exploitation and economic globalization do not provide Nike with a meaningful way to participate in the public debate over *its* overseas labor practices. (See *Thomas v. Collins*, *supra*, 323 U.S. at pp. 536-537.)

Even if the majority correctly characterizes the public issues implicated by Nike's press releases and letters, its assertion is still wrong. In light of the sophisticated media campaign directed at Nike's overseas labor practices and the close association between Nike's labor practices and the public debate over overseas labor exploitation and economic globalization, Nike could not comment on these public issues without discussing its own labor practices. Indeed, Nike could hardly condemn exploitation of overseas workers and discuss the virtues of economic globalization without implying that it helps overseas workers and does not exploit them. By limiting Nike to "innocuous and abstract discussion," the majority has effectively destroyed Nike's "right of public discussion." (*Thomas v. Collins*, *supra*, 323 U.S. at pp. 536-537.) Under these circumstances, Nike no longer "has the full panoply of protections available to its direct comments on public issues . . . ." (*Bolger*, *supra*, 463 U.S. at p. 68, fn. omitted.) Accordingly, the factual representations in Nike's press releases and letters are fully protected under current First Amendment jurisprudence. (See *Thomas v. Collins*, at pp. 536-537; *Gordon & Breach*, *supra*, 859 F.Supp. at p. 1544.)

Such a conclusion is consistent with the commercial speech decisions of the United States Supreme Court. Most of these decisions involve core commercial speech that does "no more than propose a commercial transaction."[7] (*Pittsburgh Press*,

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[7] (See, e.g., *Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 536 [oral, written, graphic, or pictorial advertisements for smokeless tobacco and cigars]; *Greater New Orleans Broadcasting*, *supra*, 527 U.S. at p. 176 [radio broadcasts of promotional ads for casino gambling]; *44 Liquormart, Inc. v. Rhode Island*, *supra*, 517 U.S. at pp. 492-493 (plur. opn. of Steven, J.) [ads referencing the price of alcohol products]; *Rubin v. Coors Brewing Co.* (1995) 514 U.S. 476, 481 [par-

supra, 413 U.S. at p. 385.) Because speech that just proposes a commercial transaction, by definition, only promotes the sale of a product or service and does not address a public issue, these decisions are inapposite.

The United States Supreme Court decisions finding hybrid speech containing both commercial and noncommercial elements to be commercial are also distinguishable. In these cases, the court found that the commercial elements of the speech were separable from its noncommercial elements and were therefore unnecessary for conveying the noncommercial message. (See *Fox*, *supra*, 492 U.S. at p. 474 [sales pitch for Tupperware was not an indispensable part of the noncommercial speech about home economics]; *Zauderer v. Office of Disciplinary Council* (1985) 471 U.S. 626, 637, fn. 7 [client solicitations were separable from noncommercial statements describing legal rights].) Because the commercial message was merely linked to—and not inextricably intertwined with—the noncommercial message, the court concluded that restrictions on the commercial message would not stifle the speaker's ability to engage in protected

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ties conceded that labels on alcohol products listing alcohol content was commercial speech]; *Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy* (1994) 512 U.S. 136, 138 [ads and promotional communications listing professional affiliations of attorney]; *United States v. Edge Broadcasting Co.* (1993) 509 U.S. 418, 421 [radio broadcasts advertising lotteries]; *Edenfield v. Fane*, *supra*, 507 U.S. at pp. 763-764 [in-person solicitations for business by certified public accountants]; *Discovery Network*, *supra*, 507 U.S. at pp. 416, 424 [parties conceded that magazines were commercial speech]; *Posadas de Puerto Rico Assoc. v. Tourism Co.* (1986) 478 U.S. 328, 330 [casino ads]; *In re R.M.J.* (1982) 455 U.S. 191, 196-197 [print ads and professional announcement cards]; *Central Hudson*, *supra*, 447 U.S. at p. 562, fn. 5 [ads "clearly intended to promote sales"]; *Friedman v. Rogers* (1979) 440 U.S. 1, 11 [trade name]; *Ohralik*, *supra*, 436 U.S. at p. 454 [in-person solicitation of business by lawyer]; *Bates*, *supra*, 433 U.S. at p. 354 [ads containing pricing information]; *Va. Consumer Council*, *supra*, 425 U.S. at pp. 760-761 [ads containing drug prices]; *Pittsburgh Press Co. v. Human Relations Comm'n* (1973) 413 U.S. 376, 379 [job ads].)

speech. As explained above, this case is different. Nike's overseas business operations have become the public issue, and Nike cannot comment on important public issues like overseas worker exploitation and economic globalization without implicating its own labor practices. (See, *ante*, at pp. 17-20.) Thus, the commercial elements of Nike's press releases, letters, and other documents were inextricably intertwined with their noncommercial elements, and they must be fully protected as noncommercial speech. (See *Riley*, *supra*, 487 U.S. at p. 796; *Thomas v. Collins*, *supra*, 323 U.S. at pp. 536-537; *Gordon & Breach*, *supra*, 859 F.Supp. at p. 1544.)

Finally, *Bolger*, the primary case relied on by the majority, is distinguishable. In *Bolger*, a contraceptive manufacturer wished to mail, among other things, informational pamphlets that discussed the problem of venereal disease and the benefits of condoms and referenced the manufacturer. The United States Postal Service banned the mailings, and the manufacturer challenged the constitutionality of the ban. (See *Bolger*, *supra*, 463 U.S. at pp. 62-63.) In assessing the constitutionality of the ban, the United States Supreme Court concluded that the informational pamphlets constituted commercial speech "notwithstanding the fact that they contain discussions of important public issues." (*Id.* at pp. 67-68, fn. omitted.) Unlike Nike's overseas business operations, however, the products at issue in *Bolger* had not become a public issue. Moreover, in the factual context of *Bolger*, the manufacturer could have commented on the issues of venereal disease and family planning through avenues other than promotional mailings and without referencing its own products. By contrast, Nike has *no* other avenue for defending its labor practices, given the breadth of sections 17204 and 17535 (see maj. opn., *ante*, at pp. 7-8), and Nike cannot comment on the issues of labor exploitation and economic globalization without referencing its own labor practices (see, *ante*, at pp. 19-20). Given these differences, *Bolger* does not compel the majority's conclusion.

Constrained by the United States Supreme Court's current formulation of the commercial speech doctrine, I would therefore conclude that Nike's press releases, letters, and other docu-

ments defending its overseas labor practices are noncommercial speech. Based on this conclusion, I would find the application of sections 17204 and 17535 to Nike's speech unconstitutional. Accordingly, I would affirm the judgment of the Court of Appeal.

V

The majority attempts to refute the application of the inextricably intertwining doctrine by factually distinguishing *Thomas* and *Thornhill*. The majority's proposed distinction, however, exposes a major flaw in its analysis. According to the majority, *Thomas* and *Thornhill* do not control because they neither address "the validity of a law prohibiting false or misleading speech" (maj. opn., *ante*, at p. 27) nor bar states from prohibiting "false and misleading factual representations, made for purposes of maintaining and increasing sales and profits, about the speaker's own products, services, or business operations" (*id.* at p. 28). The majority apparently finds this distinction persuasive because it previously concluded that Nike's speech is only "commercial speech for purposes of applying state laws designed to prevent false advertising and other forms of commercial deception." (*Id.* at p. 26.)

Although the logic is difficult to follow, the majority apparently characterizes corporate speech as commercial or noncommercial based on whether the speech is false or misleading. Such an outcome, however, betrays a fundamental misunderstanding of the issue presented in this case. As the majority acknowledges, state laws may only prohibit false or misleading speech if that speech is commercial. Thus, the critical question is whether the speech at issue is commercial or noncommercial speech. Whether the statutes at issue are "designed to prevent false advertising and other forms of commercial deception" has no bearing on this question. (Maj. opn., *ante*, at p. 26.) The majority's assertion that Nike's statements are commercial speech because the application of false advertising laws is at issue therefore makes no sense. (See *ibid.*) Indeed, the majority begs the question by making false or misleading corporate speech commercial speech because it is false or misleading.

VI

In today's world, the difference between commercial and noncommercial speech is not black and white. Due to the growing politicization of commercial matters and the increased sophistication of advertising campaigns, the intersection between commercial and noncommercial speech has become larger and larger. As this gray area expands, continued adherence to the dichotomous, all-or-nothing approach developed by the United States Supreme Court will eventually lead us down one of two unappealing paths: either the voices of businesses in the public debate will be effectively silenced, or businesses will be able to dupe consumers with impunity.

Rather than continue down this path, I believe the high court must reassess the commercial speech doctrine and develop a more nuanced inquiry that accounts for the realities of today's commercial world. Without abandoning the categories of commercial and noncommercial speech, the court could develop an approach better suited to today's world by recognizing that not all speech containing commercial elements should be equal in the eyes of the First Amendment.

For example, the United States Supreme Court could develop an intermediate category of protected speech where commercial and noncommercial elements are closely intertwined. In light of the conflicting constitutional principles at play, this intermediate category could receive greater protection than commercial speech but less protection than noncommercial speech. Under such an approach, false or misleading speech that falls within the intermediate category could be actionable so long as states do not impose liability without fault. (Cf. *Gertz*, *supra*, 418 U.S. at p. 347 ["so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual"].)

Alternatively, the court could abandon its blanket rule permitting the proscription of all false or misleading commercial speech. Instead, the court could devise a test for determining whether governmental restrictions on false or misleading speech

with commercial elements survive constitutional scrutiny. In doing so, the court could develop a more nuanced approach that maximizes the ability of businesses to participate in the public debate without allowing consumer fraud to run rampant.

Even if these suggestions are unworkable or problematic, the practical realities of today's commercial world require a new " 'accommodation between [First Amendment] concern[s] and the limited state interest present in the context of' " strict liability actions targeting speech with inextricably intertwined commercial and noncommercial elements. (*Dun & Bradstreet*, *supra*, 472 U.S. at p. 756 (plur. opn. of Powell, J.), quoting *Gertz*, *supra*, 418 U.S. at p. 343.) The high court long ago recognized that "[t]he diverse motives, means, and messages of advertising may make speech 'commercial' in widely varying degrees." (*Bigelow v. Virginia*, *supra*, 421 U.S. at p. 826.) Given the growing intersection between advertising and noncommercial speech, such as political, literary, scientific and artistic expression, this observation is equally cogent where the commercial speech is false or misleading.

I realize the task is not easy. Indeed, Justice Scalia has recently alluded to the intractability of the problem. (See *44 Liquormart v. Rhode Island*, *supra*, 517 U.S. 484, 518 (conc. opn. of Scalia, J.) ["I do not believe we have before us the wherewithal to declare *Central Hudson* wrong—or at least the wherewithal to say what ought to replace it"].) Nonetheless, a new accommodation of the relevant constitutional concerns is possible, and the United States Supreme Court can and should devise a more nuanced approach that guarantees the ability of speakers engaged in commerce to participate in the public debate without giving these speakers free rein to lie and cheat.

For example, such an accommodation could permit states to bar *all* false or misleading representations about the characteristics of a product or service—i.e., the efficacy, quality, value, or safety of the product or service—without justification even if these characteristics have become a public issue. In such a situation, the governmental interest in protecting consumers from fraud is especially strong because these representations address the fundamental questions asked by every consumer

when he or she makes a buying decision: does the product or service work well and reliably, is the product or service harmful and is the product or service worth the cost? Moreover, these representations are the traditional target of false advertising laws. Thus, the strong governmental interest in this context trumps any First Amendment concerns presented by a blanket prohibition on such false or misleading representations.

By contrast, the governmental interest in protecting against consumer fraud is less strong if the representations are unrelated to the characteristics of the product or service. In some situations involving these representations, the First Amendment concerns *may* trump this governmental interest. A blanket prohibition of false or misleading representations in such a situation would be unconstitutional because the prohibition may stifle the ability of businesses to comment on public issues. Indeed, this case offers a prime example. Making Nike strictly liable for any false or misleading representations about its labor practices stifles Nike's ability to participate in a public debate *initiated by others*. Accommodating the competing interests in this context precludes the blanket prohibition favored by the majority. Although strict liability is inappropriate, an actual malice standard may be too high because these representations undoubtedly influence some consumers in their buying decisions, and the government has a strong interest in minimizing consumer deception. Thus, a well-crafted test could give states the flexibility to define the standard of liability for false or misleading misrepresentations in this context so long as the standard is not strict liability.[8] (Cf. *Gertz*, *supra*, 418 U.S. at p. 347.)

VII

The majority accuses me of searching for my own "magic formula or incantation" because I urge a reevaluation of the commercial speech doctrine. (Maj. opn, *ante*, at p. 33.) To this

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[8] States may, however, adopt a strict liability standard for false and misleading representations unrelated to the characteristics of a product or service where the representations are not inextricably tied to a public issue.

charge, I plead guilty. Unlike the majority who finds nothing unsettling about doctrinal incoherence, I readily acknowledge that some wizardry may be necessary if courts are to adapt the commercial speech doctrine to the realities of today's commercial world. Unfortunately, Merlin and Gandalf are busy, so the United States Supreme Court will have to fill the gap.

Although I make these magical references in jest, my point is serious: the commercial speech doctrine needs and deserves reconsideration and this is as good a place as any to begin. I urge the high court to do so here.

BROWN, J.

MARC KASKY,
Plaintiff and Appellant,
v.
NIKE, INC., et al.
Defendants and Respondents.

No. S087859

CALIFORNIA SUPREME COURT

May 2, 2002, Decided

MODIFICATION OF OPINION

THE COURT:

The majority opinion in this matter is modified as follows:

In the second full paragraph on page 7 of the opinion, the last sentence and accompanying citation are amended to read: "An order for restitution is one 'compelling a UCL defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken.' (*Kraus v. Trinity Management Services, Inc., supra,* 23 Cal.4th at pp. 126-127.)"

This modification does not affect the judgment.

MARC KASKY,
Plaintiff and Appellant,
v.
NIKE, INC., et al.
Defendants and Respondents.

No. A086142

CALIFORNIA COURT OF APPEAL

FIRST APPELLATE DISTRICT
DIVISION ONE

March 20, 2000, Decided

In this private attorney general action against Nike, Inc., and five of its corporate officers, the nominal plaintiff appeals from a judgment of dismissal entered on an order sustaining the defendants' demurrer on First Amendment grounds. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Nike, Inc., a marketer of athletic shoes and sports apparel, has grown into a large multinational enterprise through a marketing strategy centering on a favorable brand image, which is associated with a distinctive logo and the advertising slogan, "Just do it." To maintain this image, the company invests heavily in advertising and brand promotion, spending no less than $978,251,000 for the year ending May 31, 1997. The promotional activities include product sponsorship agreements with celebrity athletes, professional athletic teams, and numerous college athletic teams. Reviewing the company's successful marketing strategy, the 1997 annual report asserts, "[W]e are a company . . . that is based on a brand, one with a genuine and distinct personality, and tangible, emotional connections to consumers the world over . . . ."

Like other major marketers of athletic shoes and sports apparel, Nike contracts for the manufacture of its products in countries with low labor costs. In Nike's case, the actual production facilities are owned by South Korean and Taiwanese companies that manufacture the products under contract with Nike. The bulk of Nike products are manufactured in China, Thailand, and Indonesia, though some components or products involving more complex technology are manufactured in South Korea or Taiwan. In 1995, a Korean company opened up a major new facility in Vietnam, giving that country also a significant share of Nike's production. The record indicates that between 300,000 and 500,000 workers are employed in Asian factories producing Nike products. The complaint alleges that the vast majority of these workers are women under the age of 24.

The company has sought to foster the appearance and reality of good working conditions in the Asian factories producing its products. All contractors are required to sign a Memorandum of Understanding that, in general, commits them to comply with local laws regarding minimum wage, overtime, child labor, holidays and vacations, insurance benefits, working conditions, and other similar matters and to maintain records documenting their compliance. To assure compliance, the company conducts spot audits of labor and environmental conditions by accounting firms. Early in 1997, Nike retained a consulting firm, co-chaired by Andrew Young, the former ambassador to the United Nations, to carry out an independent evaluation of the labor practices in Nike factories. After visits to 12 factories, Young issued a report that commented favorably on working conditions in the factories and found no evidence of widespread abuse or mistreatment of workers.

Nevertheless, Nike was beset in 1996 and 1997 with a series of reports on working conditions in its factories that contrasted sharply with the favorable view in the Young report. An accounting firm's spot audit of the large Vietnamese factory, which was leaked to the press by a disgruntled employee, reported widespread violations of local regulations and atmos-

pheric pollution causing respiratory problems in 77 percent of the workers. An investigator for Vietnam Labor Watch found evidence of widespread abuses and a pervasive "sense of desperation" from 35 interviews with Vietnamese workers. An Australian organization published a highly critical case study on Nike's Indonesian factories. And the Hong Kong Christian Industrial Committee released an extensively documented study of several Chinese factories, including three used by Nike, which reported 11- to 12-hour work days, compulsory overtime, violation of minimum wage laws, exposure to dangerous levels of dust and toxic fumes, and employment of workers under the age of 16.

These reports put Nike under an unusual degree of public scrutiny as a company exemplifying a perceived social evil associated with economic globalization–the exploitation of young female workers in poor countries. An article in The Oregonian of Portland, Oregon, asserted: "The company's worldwide production system has turned the Beaverton giant into an international human rights incident." The News & Record of Greensboro, North Carolina, asked, "But who wants to enjoy products made on the backs of human misery?" The New York Times carried a series of eight articles in 1996 and 1997, reporting "grim conditions" and widespread human rights abuses in Nike factories. And a CBS television report juxtaposed the complaints of a Vietnamese worker with disclaimers by company officials.

Nike countered with a public relations campaign that defended the benefits of its Asian factories to host countries and sought to portray the company as being in the vanguard of responsible corporations seeking to maintain adequate labor standards in overseas facilities. Press releases responded to sweatshop allegations, addressed women's issues, stressed the company's code of conduct, and broadly denied exploitation of underage workers. A more lengthy press release, entitled "Nike Production Primer" answered a series of allegations with detailed information and footnoted sources. Another release drew attention to the favorable Young report and invited readers to consult it on-line. A letter to the presidents and athletic directors

of those colleges sponsoring Nike products defended the company's labor practices. And company officials sought to rebut specific charges in letters to the editor and to nonprofit organizations.

The complaint alleges that, in the course of this public relations campaign, Nike made a series of six misrepresentations regarding its labor practices: (1) "that workers who make NIKE products are . . . not subjected to corporal punishment and/or sexual abuse;" (2) "that NIKE products are made in accordance with applicable governmental laws and regulations governing wages and hours;" (3) "that NIKE products are made in accordance with applicable laws and regulations governing health and safety conditions;" (4) "that NIKE pays average line-workers double-the-minimum wage in Southeast Asia;" (5) "that workers who produce NIKE products receive free meals and health care;" and (6) "that NIKE guarantees a 'living wage' for all workers who make NIKE products." In addition, the complaint alleges that NIKE made the false claim that the Young report proves that it "is doing a good job and 'operating morally.' "

The first and second causes of action, based on negligent misrepresentation and intentional or reckless misrepresentation, alleged that Nike engaged in an unlawful business practice in violation of Business and Professions Code section 17200 by making the above misrepresentations "In order to maintain and/or increase its sales and profits . . . through its advertising, promotional campaigns, public statements and marketing . . . ." The third cause of action alleged unfair business practices within the meaning of section 17200, and the fourth cause of action alleged false advertising in violation of Business and Professions Code section 17500. The prayer sought an injunction ordering Nike "to disgorge all monies" that it acquired by the alleged unlawful and unfair practices, "to undertake a Court-approved public information campaign" to remedy the misinformation disseminated by its false advertising and unlawful and unfair practices, and to cease "[m]isrepresenting the working conditions under which NIKE products are made . . . ."

Nike and the individual defendants filed demurrers to the complaint challenging the application of Business and Profes-

sions Code sections 17200 and 17500 and contending that the complaint is barred by the First Amendment to the United States Constitution and article I, section 2(a), of the California Constitution. The trial court regarded the constitutional distinction between commercial and noncommercial speech to be dispositive. Following a hearing, the court sustained the demurrers without leave to amend and entered a judgment of dismissal from which the plaintiff appeals.

DISCUSSION

Like the trial court, we chose to analyze the important constitutional issues raised by the action and express no opinion as to the multiple objections raised by Nike regarding the application of Business and Professions Code section 17200 to the facts of the case.

"On appeal from a judgment of dismissal after a demurrer is sustained without leave to amend, appellate courts assume the truth of all facts properly pleaded by the plaintiff-appellant." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 1999) par. 8:136, p. 8-65; *Day v. AT & T Corp.* (1998) 63 Cal.App.4th 325, 331.) Hence, we are obliged to assume that Nike in fact misrepresented facts regarding the labor practices in its Asian factories to induce consumers to buy its products. Plaintiff relies chiefly on the theory that these alleged misrepresentations fall within the category of commercial speech for which Nike can be held accountable under accepted constitutional principles.

Since extending First Amendment protection to commercial speech in *Bigelow v. Virginia* (1975) 421 U.S. 809 and *Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S. 748, the United States Supreme Court has "been careful to distinguish commercial speech from speech at the First Amendment's core. ' "[C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values," and is subject to "modes of regulation that might be impermissible in the realm of noncommercial expression." ' " (*Florida Bar v. Went for It, Inc.* (1995) 515 U.S.

618, 623, citing *Board of Trustees of State Univ. of N. Y. v. Fox* (1989) 492 U.S. 469, 477.)[1]

A line of decisions extending from *Va. Pharmacy Bd.* has sanctioned restraints on commercial speech that is false, deceptive or misleading. (*Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. at pp. 770-771.) As stated in *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 383, "[a]dvertising that is false, deceptive, or misleading of course is subject to restraint. [Citation.] Since the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech. [Citation.] . . . [T]he public and private benefits from commercial speech derive from confidence in its accuracy and reliability. Thus, the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena." (See also *Ibanez v. Florida Dept of Business and Professional Regulation, Bd. of Accountancy* (1994) 512 U.S. 136, 142; *Edenfield v. Fane* (1993) 507 U.S. 761, 768; *People v. Morse* (1993) 21 Cal.App.4th 259, 265;

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[1] It has long been recognized that the First Amendment of the United States Constitution applies to the states under the due process clause of the Fourteenth Amendment. (*44 Liquormart, Inc. v. Rhode Island* (1996) 517 U.S. 484, 489, fn. 1.) In certain contexts, article I, section 2, of the California Constitution offers a " 'more definitive and inclusive . . .' " protection of free speech than the First Amendment of the United States Constitution (*Spiritual Psychic Science Church v. City of Azusa* (1985) 39 Cal.3d 501, 519, citation omitted; *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, 908). But we see no basis for distinguishing between the federal and state Constitutions with respect to the issues here on appeal and will refer to both Constitutions by use of the term "First Amendment." In declining to differentiate between the state and federal Constitutions, we find support in *People v. Superior Court (Olson)* 96 Cal.App.3d 181 [equating the protection of commercial speech under the California and federal Constitutions] and *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711 [applying same standard of liability for defamation under both Constitutions]. (See also *Leonardini v. Shell Oil Co.* (1989) 216 Cal.App.3d 547, 555, fn. 1.)

People v. Superior Court (Olson), supra, 96 Cal.App.3d at p. 191.)

To distinguish between commercial and noncommercial speech, we begin with the leading United States Supreme Court decision, *Bolger v. Youngs Drug Products Corp.* (1983) 463 U.S. 60. There, a condom manufacturer faced prosecution for unsolicited mailings regarding its product. Most of the mailings consisted of advertisements conveying price and quantity information about the plaintiff's brand, which, the court held, fell "within the core notion of commercial speech—'speech which does "no more than propose a commercial transaction." ' [Citation.]" (*Id.* at p. 66, fn. omitted.) But the manufacturer also mailed two informational pamphlets about condom use, containing no more than references to its brand of condoms. Holding that these pamphlets were also commercial speech, the court considered a series of relevant characteristics: "The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech. [Citation.] Similarly, the reference to a specific product does not by itself render the pamphlets commercial speech. [Citation.] Finally, the fact that [plaintiff] has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech. [Citations.] [¶] The combination of *all* these characteristics, however, provides strong support for the District Court's conclusion that the informational pamphlets are properly characterized as commercial speech." (*Id.* at pp. 66-67, fns. omitted.)[2]

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[2] The decisional law offers an array of verbal formulations to distinguish commercial and noncommercial speech. *Central Hudson Gas & Elec. v. Public Serv. Comm'n* (1980) 447 U.S. 557, 561, broadly describes commercial speech as "expression related solely to the economic interests of the speaker and its audience." (See also *In re R. M. J.* (1982) 455 U.S. 191, 204, fn. 17.) Other decisions refer to a narrower characterization of commercial speech found in *Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. at p. 762 – "speech which does 'no more than propose a commercial transaction . . . .' " (E.g., *Board of Trustees, State Univ. of N. Y. v. Fox* (1989) 492 U.S. 469, 473; *Posadas de Puerto Rico Assoc. v. Tourism Co.* (1986) 478 U.S. 328, 340.) In *Spiritual Psychic Science Church v. City of Azusa, supra,* 39 Cal. 3d at p. 511, our high court sought to bridge the gap between this differing language with a somewhat more flexible formulation: "commercial speech is that which has but one purpose to advance an economic transaction." (See conc. opn. of Stevens, J. in *Central Hudson Gas & Elec. v. Public Serv. Comm'n, supra,* at pp. 579-580.)

We find our way out of this complexity by relying on the *Bolger* decision. Our reliance on *Bolger* follows federal decisions in *Association of Nat. Advertisers, Inc. v. Lungren* (9th Cir. 1994) 44 F.3d 726, 728, and *Semco, Inc. v. Amcast, Inc.* (6th Cir. 1995) 52 F.3d 108, 112-113, and the recent decision in *Keimer v. Buena Vista Books, Inc.* (1999) 75 Cal.App.4th 1220, 1228-1229, and appears to be mandated by *Cincinnati v. Discovery Network, Inc.* (1993) 507 U.S. 410, which also discusses *Bolger* as the most pertinent and authoritative precedent dealing with the distinction between commercial and noncommercial speech. In our view, the general discussion of commercial and noncommercial speech in *Spiritual Psychic Science Church v. City of Azusa, supra,* 39 Cal.3d 501 is consistent with the more precise guidelines in the *Bolger* decision.

[3] Repealed. (Stats. 1995, ch. 642, § 2, p. 92.)

The *Bolger* distinction was applied by the Ninth Circuit in *Association of Nat. Advertisers, Inc. v. Lungren, supra,* 44 F.3d 726, to representations, like those at issue here, that appealed to the consumer's sense of social responsibility. Former California Business and Professions Code section 17508.5[3] prohibited a manufacturer or distributor of consumer goods from making a series of representations regarding the environmental impact of the goods, such as that they were "ozone friendly" or "biodegradable," unless the goods met certain statutory definitions of these terms. Though falling outside the "core notion" of commercial speech, the court concluded that these environmental representations constituted commercial speech as defined by the three characteristics recognized in the *Bolger* decision. An earlier decision, on which appellant relies, concerned representations about the effects of a product on health. In *National Com'n on Egg Nutrition v. F. T. C.* (7th Cir. 1977) 570 F.2d 157, the court reviewed a Federal Trade Commission order di-

recting a trade association to desist from disseminating advertisements to the effect that "there is no scientific evidence that eating eggs increases the risk of heart and circulatory disease." (*Id.* at p. 158, fn. omitted.) The court held that the advertisements fell within the category of " 'deceptive or misleading' commercial speech," subject to restraint under the First Amendment. (*Id.* at p. 162, citation omitted.)

Though the *Bolger, Egg Nutrition,* and *Association of National Advertisers* decisions present certain points of similarity to the present case, they differ in one fundamental respect: they concern communications conveying information or representations about specific characteristics of goods. In contrast, the speech at issue here was intended to promote a favorable corporate image of the company so as to induce consumers to buy its products. A Nike executive expressed this business objective in a letter to the editor: "Consumers . . . want to know they support companies with good products and practices. . . . During the shopping season, we encourage shoppers to remember that Nike is the industry's leader in improving factory conditions."

The fact that the communications at issue here served to promote a favorable corporate image through press releases and letters takes them outside two of the three characteristics of commercial speech noted in the *Bolger* decision—advertising format and reference to specific product. We recognize that false press releases may support claims for damages or injunctive relief (*S.E.C. v. Rana Research, Inc.* (9th Cir. 1993) 8 F.3d 1358; *Southwell v. Mallery, Stern & Warford* (1987) 194 Cal.App.3d 140, 142-143; cf., *Semco, Inc. v. Amcast, Inc., supra,* 52 F.3d at pp. 112-113), and we are mindful that the *Bolger* court did not "mean to suggest that each of the characteristics present in this case must necessarily be present in order for speech to be commercial." (*Bolger v. Youngs Drug Products Corp., supra,* 463 U.S. at p. 67, fn. 14.) But we think that a public relations campaign focusing on corporate image, such as that at issue here, calls for a different analysis than that applying to product advertisement.

The question of possible rights to be accorded to advertising or public relations devoted to enhancement of a corporate image

may revolve around issues of property rights, rather than First Amendment protections, where the speech lacks "intrinsic meaning" or public interest. (*Friedman v. Rogers* (1979) 440 U.S. 1, 12; see also *Central Hudson Gas & Elec. v. Public Serv. Comm'n, supra,* 447 U.S. at p. 580 (conc. opn. of Stevens, J.).) But the case at bar lies in familiar First Amendment territory – public dialogue on a matter of public concern. Though drafted in terms of commercial speech, the complaint in fact seeks judicial intervention in a public debate.

The "heart of the First Amendment's protection" lies in " 'the liberty to discuss publicly and truthfully all matters of public concern . . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.' " (*First National Bank of Boston v. Bellotti* (1978) 435 U.S. 765, 776, quoting *Thornhill v. Alabama* (1940) 310 U.S. 88, 101-102.) In crafting this much quoted language,[4] the *Thornhill* court noted that the "exigencies" of the colonial period which gave birth to the First Amendment, centered around freedom from oppressive administration of government, but, in the industrial society of 1940, the same constitutionally protected "area of free discussion" embraced the dissemination of information about labor disputes. (*Thornhill v. Alabama, supra,* at p. 102; see also *Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. at pp. 762-763, fn. 17; *Spiritual Psychic Science Church v. City of Azusa, supra,* 39 Cal.3d at p. 511.) By the same logic, the labor practices of foreign contractors of domestic companies come within the "exigencies" of our times.

Nike exemplifies the perceived evils or benefits of labor practices associated with the processes of economic globalization. Though participants in purely private labor disputes are

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[4] See e.g., *Time, Inc. v. Hill* (1966) 385 U.S. 374, 388; *First National Bank of Boston v. Bellotti, supra,* 435 U.S. at page 776; *Bolger v. Youngs Drug Products Corp., supra,* 463 U.S. at page 68, footnote 15.

entitled to certain First Amendment protections,[5] Nike's strong corporate image and widespread consumer market places its labor practices in the context of a broader debate about the social implications of employing low-cost foreign labor for manufacturing functions once performed by domestic workers. We take judicial notice that this debate has given rise to urgent calls for action ranging from international labor standards to consumer boycotts. Information about the labor practices at Nike's overseas plants thus constitutes data relevant to a controversy of great public interest in our times.

Freedom of " 'expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values." ' [Citations.]" (*FCC v. League of Women Voters of California* (1984) 468 U.S. 364, 381.) As stated in *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, "[t]he general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard . . . 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' [Citation.]" (*Id.* at p. 269.) And, it represents a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ." (*Id.* at p. 270.)

It follows that "under the free speech guaranty the validity and truth of declarations in political disputes over issues of public interest must be resolved by the public and not by a judge." (*Leonardini v. Shell Oil Co., supra,* 216 Cal.App.3d at p. 579, fn. 10.) "In the context of . . . public debate on a matter of public interest, the truth of the statement is irrelevant." (*Id.* at p. 577; see also *Wilson v. Superior Court* (1975) 13 Cal.3d 652, 659; *O'Connor v. Superior Court* (1986) 177 Cal.App.3d 1013, 1019.) In the famous words of Judge Learned Hand, the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any

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[5] *NLRB v. Gissel Packing Co.* (1969) 395 U.S. 575, 617; Labor *Board v. Virginia Power Co.* (1941) 314 U.S. 469, 477; *A. F. of L. v. Swing* (1941) 312 U.S. 321, 325-326.)

kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." (*United States v. Associated Press* (S.D. N.Y. 1943) 52 F.Supp. 362, 372; see also *New York Times Co. v. Sullivan, supra,* 376 U.S. at p. 270.)

By protecting the public's access to "diverse and antagonistic sources" (*Associated Press v. United States* (1945) 326 U.S. 1, 20), the First Amendment serves an "informational purpose" (*First National Bank of Boston v. Bellotti, supra,* 435 U.S. at p. 782, fn. 18), guaranteeing "the public access to discussion, debate, and the dissemination of information and ideas." (*Id.* at p. 783, fn. omitted; see also *id.* at p. 777, fn. 12.) The citizen enjoys this right of access to the free flow of information and ideas both for purposes of political decisionmaking in a democracy—the traditional "core" of the First Amendment[6]—and for private decisions significant to the conduct of life.[7] In *Linmark Associates, Inc. v. Willingboro* (1977) 431 U.S. 85, the court struck down a local ordinance banning "for sale" signs in front of residences, which was intended to dampen home sales motivated by racial fears. The First Amendment, the court held, prohibits any attempt to regulate the information available for the important personal choice of purchasing or selling a home. "That information, which pertains to sales activity in Willingboro, is of vital interest to Willingboro residents, since it may bear on one of the

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[6] *Posadas de Puerto Rico Assoc. v. Tourism Co., supra,* 478 U.S. at page 340, footnote 7 ["such political dialogue is at the core of . . . the first amendment"]. (Citation and internal quotation marks omitted.)

[7] To the extent that the protection of corporate speech benefits the citizen's access to information, corporate rights under the First Amendment may be described as being derivative, i.e., based on the need to protect the public's right of access to information. (Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State* (1991) 79 Cal.L.Rev. 1229, 1233, 1245-1248.) The derivative nature of the corporate right to assert the protection of the First Amendment resolves the paradox of recognizing a right of free speech in an artificial entity "existing only in contemplation of law." (*Dartmouth College v. Woodward* (1819) 17 U.S. 517, 634, Marshall, J.)

most important decisions they have a right to make: where to live and raise their families." (*Id.* at p. 96.)

The press releases and letters at issue here cross the boundary between political and private decisionmaking. The citizen may want to translate personal discontent over Nike's labor practices into political action or may merely wish to refrain from purchasing its products manufactured by undesired labor practices, just as he or she may wish to buy products with a union identification. (See *Spiritual Psychic Science Church v. City of Azusa, supra,* 39 Cal.3d at p. 511 ["an advertisement informing the public that the cherries for sale at store X were picked by union workers . . . communicates a message beyond that related to the bare economic interests of the parties."].) In either case, "the First Amendment protects the public's interest in receiving information." (*Pacific Gas & Elec. Co. v. Public Util. Comm'n* (1986) 475 U.S. 1, 8.)

Finally, we note that "commercial motivation does not transform noncommercial speech into commercial speech . . . ." (*Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1048, fn. 3; see also *Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. at p. 762; *Leonardini v. Shell Oil Co., supra,* 216 Cal.App.3d at p. 576, fn. 8; *O'Connor v. Superior Court, supra,* 177 Cal.App.3d at p. 1018.) The present case is not one in which commercial speech is linked to noncommercial speech (*Zauderer v. Office of Disciplinary Counsel* (1985) 471 U.S. 626, 637, fn. 7; *Bolger v. Youngs Drug Products Corp., supra,* 463 U.S. at p. 68; *Central Hudson Gas & Elec. v. Public Serv. Comm'n, supra,* 447 U.S. at p. 563, fn. 5), nor again one in which commercial and noncommercial speech are " 'inextricably intertwined.' " (*Board of Trustees, State Univ. of N. Y. v. Fox, supra,* 492 U.S. at p. 474, citation omitted.) Rather, the record discloses noncommercial speech, addressed to a topic of public interest and responding to public criticism of Nike's labor practices. The fact that Nike has an economic motivation in defending its corporate image from such criticism does not alter

the significance of the speech to the "listeners"[8] the consumers or other members of the public concerned with labor practices attending the process of economic globalization.

Our analysis of the press releases and letters as forming part of a public dialogue on a matter of public concern within the core area of expression protected by the First Amendment compels the conclusion that the trial court properly sustained the defendants' demurrer without leave to amend. We see no merit to appellant's scattershot argument that he might still be able to state a cause of action on some theory allowing content-related abridgement of noncommercial speech. The United States Supreme Court allows content-based restrictions on noncommercial speech only if they come within very narrowly defined circumstances, such as libel, obscenity, fighting words (*Consolidated Edison Co. v. Public Serv. Comm'n* (1980) 447 U.S. 530, 538, fn. 5), or "survive the exacting scrutiny necessitated by a state-imposed restriction of freedom of speech." (*First National Bank of Boston v. Bellotti, supra,* 435 U.S. at p. 786.) The complaint does not allege facts coming within these narrow exceptions, and we see no reasonable possibility that it could be amended to do so. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

The judgment is affirmed. Costs are awarded to respondent.

SWAGER, J.

WE CONCUR:

STEIN, ACTING P.J.

MARCHIANO, J.

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[8] See *Linmark Associates, Inc. v. Willingboro, supra,* 431 U.S. at page 92, referring to prospective home buyers as "listeners," entitled to First Amendment protection.

MARC KASKY, on Behalf of the General Public of the State of California,

Plaintiff,

v.

NIKE, INC., PHILIP KNIGHT, THOMAS CLARKE, MARK PARKER, STEPHEN GOMEZ, DAVID TAYLOR and DOES 1 through 200,

Defendants.

Case No. 994446

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

ORDER SUSTAINING DEMURRER BY DEFENDANTS NIKE, INC., PHILIP KNIGHT, THOMAS CLARKE, MARK PARKER AND DAVID TAYLOR TO PLAINTIFFS' FIRST AMENDED COMPLAINT

The Demurrer of Defendants Nike, Inc., Philip Knight, Thomas Clarke, Mark Parker and David Taylor ("Defendants") to Plaintiff's First Amended Complaint came on regularly for hearing on January 7, 1999 at 9:30 a.m., in the Law and Motion Department of this Court. Robert P. Varian of Brobeck, Phleger & Harrison LLP appeared on behalf of Defendants. Paul R. Hoeber and Alan M. Caplan appeared on behalf of Plaintiff.

After full consideration of the authorities and arguments of counsel, and there being good cause therefor,

IT IS HEREBY ORDERED that Defendants Nike, Inc., Philip Knight, Thomas Clarke, Mark Parker and David Taylor's Demurrer to Plaintiff's First Amended Complaint IS SUSTAINED WITHOUT LEAVE TO AMEND.

The Honorable David A. Garcia
San Francisco County
Superior Court

DATED: 2/4/99

MARC KASKY, on Behalf of the General Public of the State of California,

Plaintiff,

v.

NIKE, INC., PHILIP KNIGHT, THOMAS CLARKE, MARK PARKER, STEPHEN GOMEZ, DAVID TAYLOR and DOES 1 through 200,

Defendants.

Case No. 994446

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

JUDGMENT DISMISSING COMPLAINT

The Court having sustained the Demurrer of Defendants Nike, Inc., Philip Knight, Thomas Clarke, Mark Parker and David Taylor ("Defendants") to Plaintiff's First Amended Complaint without leave to amend.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, pursuant to Code of Civil Procedure section 581(f)(1), Plaintiff's First Amended Complaint against Defendants is dismissed with prejudice.

The Honorable David A. Garcia
San Francisco County
Superior Court

DATED: 2/5/99

SUPREME COURT OF CALIFORNIA

MARC KASKY,
Plaintiff and Appellant,
v.
NIKE, INC., et al.
Defendants and Respondents.
No. S087859

COURT OF APPEAL FOR THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT DIVISION

JULY 31, 2002, Decided

Rehearing denied.

The request for modification of the opinion is denied.

Baxter, J., and Chin, J., are of the opinion the petition should be granted.

Brown, J., was absent and did not participate.

RELEVANT STATUTORY PROVISIONS

The California Business and Professions Code provides in relevant part:

17200. Definition.

As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

17201. Person.

As used in this chapter, the term person shall mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons.

17202. Specific or preventive relief.

Notwithstanding Section 3369 of the Civil Code, specific or preventive relief may be granted to enforce a penalty, forfeiture, or penal law in a case of unfair competition.

17203. Remedies and jurisdiction.

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

17204. Injunction prosecuted by Attorney General, district attorney, or city attorney.

Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney or by any county counsel authorized by agreement with the district attorney in actions in-

volving violation of a county ordinance, or any city attorney of a city, or city and county, having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor or, with the consent of the district attorney, by a city attorney in any city and county in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public.

17205. Cumulative penalties.

Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state.

17206. Civil penalty for violation of chapter.

(a) Any person who engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General, by any district attorney, by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, by any city attorney of a city, or city and county, having a population in excess of 750,000, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor, or, with the consent of the district attorney, by a city attorney in any city and county, in any court of competent jurisdiction.

(b) The court shall impose a civil penalty for each violation of this chapter. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.

(c) If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State General Fund. If the action is brought by a district attorney or county counsel, the penalty collected shall be paid to the treasurer of the county in which the judgment was entered. Except as provided in subdivision (d), if the action is brought by a city attorney or city prosecutor, one-half of the penalty collected shall be paid to the treasurer of the city in which the judgment was entered, and one-half to the treasurer of the county in which the judgment was entered.

(d) If the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action. Before any penalty collected is paid out pursuant to subdivision (c), the amount of any reasonable expenses incurred by the board shall be paid to the state Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund, the moneys shall be paid to the state Treasurer. The amount of any reasonable expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality or county that funds the local agency.

(e) If the action is brought by a city attorney of a city and county, the entire amount of the penalty collected shall be paid to the treasurer of the city and county in which the judgment was entered. However, if the action is brought by a city attorney of a city and county for the purposes of civil enforcement pursuant to Section 17980 of the Health and Safety Code or Article 3 (commencing with Section 11570) of Chapter 10 of Division 10 of the Health and Safety Code, either the penalty collected shall be paid entirely to the treasurer of the city and county in which the judgment was entered or, upon the request of the city attorney, the court may order that up to one-half of the penalty, under court supervision and approval, be paid for the purpose of restoring, maintaining, or enhancing the premises that were the subject

of the action, and that the balance of the penalty be paid to the treasurer of the city and county.

17207. Violation of injunction.

(a) Any person who intentionally violates any injunction prohibiting unfair competition issued pursuant to Section 17203 shall be liable for a civil penalty not to exceed six thousand dollars ($6,000) for each violation. Where the conduct constituting a violation is of a continuing nature, each day of that conduct is a separate and distinct violation. In determining the amount of the civil penalty, the court shall consider all relevant circumstances, including, but not limited to, the extent of the harm caused by the conduct constituting a violation, the nature and persistence of that conduct, the length of time over which the conduct occurred, the assets, liabilities, and net worth of the person, whether corporate or individual, and any corrective action taken by the defendant.

(b) The civil penalty prescribed by this section shall be assessed and recovered in a civil action brought in any county in which the violation occurs or where the injunction was issued in the name of the people of the State of California by the Attorney General or by any district attorney, any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or any city attorney in any court of competent jurisdiction within his or her jurisdiction without regard to the county from which the original injunction was issued. An action brought pursuant to this section to recover civil penalties shall take precedence over all civil matters on the calendar of the court except those matters to which equal precedence on the calendar is granted by law.

(c) If such an action is brought by the Attorney General, one-half of the penalty collected pursuant to this section shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State Treasurer. If brought by a district attorney or county counsel the entire amount of the penalty collected shall be paid to the treasurer of the county in which the judgment is entered. If brought by a city attorney or city prosecutor, one-half of the penalty shall be paid to the treasurer of the

county in which the judgment was entered and one-half to the city, except that if the action was brought by a city attorney of a city and county the entire amount of the penalty collected shall be paid to the treasurer of the city and county in which the judgment is entered.

(d) If the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action. Before any penalty collected is paid out pursuant to subdivision (c), the amount of the reasonable expenses incurred by the board shall be paid to the State Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund, the moneys shall be paid to the State Treasurer. The amount of the reasonable expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality or county which funds the local agency. 17208. Any action to enforce any cause of action pursuant to this chapter shall be commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section shall be revived by its enactment.

17500. False or misleading statements generally.

It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement, concerning that real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is

known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised. Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both that imprisonment and fine.

17506. "Person."

As used in this chapter, "person" includes any individual, partnership, firm, association, or corporation.

§ 17535. Injunction against violations; Restitution.

Any person, corporation, firm, partnership, joint stock company, or any other association or organization which violates or proposes to violate this chapter may be enjoined by any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person, corporation, firm, partnership, joint stock company, or any other association or organization of any practices which violate this chapter, or which may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of any practice in this chapter declared to be unlawful.

Actions for injunction under this section may be prosecuted by the Attorney General or any district attorney, county counsel, city attorney, or city prosecutor in this state in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public.